83-1050

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PHILLIP EMRICH and ERIC GILLBERG,
Petitioners,

vs.

TOUCHE ROSS & CO.,
Respondent,

PHILLIP EMRICH and ERIC GILLBERG,
Petitioners,

vs.

SAM BATTISTONE, SR., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. May a party's chosen counsel be automatically disqualified solely because of a prior representation by co-counsel of an adverse party?

2. Can members of a putative class be forever barred from suing a party solely because a former counsel for a class representative in a related class action agreed with that party that he would not sue the party even if such agreement was not approved by the court and class members were never given notice of such agreement as required by Federal Rule of Civil Procedure 23(e)?

PARTIES TO THE PROCEEDING

Petitioners Phillip Emrich and Eric Gillberg are the named representatives for a putative class of 375 members in two actions consolidated for argument and decision. The other members of the class are listed in Appendix A hereto. The first action is Phillip Emrich and Eric Gillberg v. Touche Ross & Co., No. 81-5940, D.C. No. CV 81-4104 R, and the second action is Phillip Emrich and Eric Gillberg v. Sam Battistone, Sr., et al, No. 82-5356, D.C. No. CV 81-4547 R. Other defendants in the second action are: Sam D. Battistone, Jr., F. Newell Bohnett, Robert Hild, Owen Johnston, William L. Wagner, Sr., George McKaig, Dan V. Angeloff, George A. Cavelletto, and Bruce N. Anticouni.

These actions were before Judge

Manuel L. Real of the United States District Court for the Central District of California and consolidated before the United States Court of Appeals for the Ninth Circuit.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered June 30, 1983, upon which petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc was denied. September 27, 1983.

OPINIONS BELOW

In the first action consolidated for argument and decision, Phillip Emrich and Eric Gillberg v. Touche Ross & Co., Judge Manuel L. Real of the United States District Court for the Central District of California granted. on November 2, 1981, defendant's Motion to Disqualify all plaintiffs' counsel and entered a written order on November 9, 1981 dismissing the action, reprinted as Appendix B hereto.

In the second actien consolidated for argument and decision, Phillip Emrich, et al v. Sam Battistone, Sr., et al, Judge Real granted defendants' Motion to Disqualify all plaintiffs' counsel on January 18, 1982, and entered a written order on January 25, 1982, amended on February 11, 1982, dismissing that

action, reprinted as Appendix C hereto.

The United States Court of Appeals for the Ninth Circuit consolidated these cases and affirmed Judge Real's orders disqualifying all plaintiffs' counsel in a Memorandum dated June 30, 1983, reprinted as Appendix D hereto, and filed an Order denying petitioners' Petition for Rehearing on September 27, 1983, reprinted as Appendix E hereto.

JURISDICTION OF THIS COURT

The Memorandum of the United States Court of Appeals for the Ninth Circuit was filed on June 30, 1983. The Order denying Petition for Rehearing by the United States Court of Appeals for the Ninth Circuit was filed on September 27, 1983.

The jurisdiction of this court is

invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The rule involved is FRCP 23(e), which provides:

> **(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

In 1980, a group of investors, who in 1978 had purchased securities of Sambo's Restaurants, Inc. ("Sambo's"), retained the law firm of Latham & Watkins ("Latham") to seek rescission of the securities purchases. A class action lawsuit was filed, Muller et al v. Sambo's Restaurants, Inc., et al, No. 80-3757-R ("Muller"), naming as defendants Sambo's and two banks that had financed

the securities offering. The district court subsequently certified Muller as a class action but excluded from the class former Sambo's officers and directors who had also purchased such securities.

In April 1981, Latham resigned as counsel for the Muller plaintiffs, and the law firm of Mullen & Stabile ("Stabile") was substituted as counsel. A few months later, Stabile associated as counsel in Muller the law firms of Stoll & Stoll, P.C. ("Stoll"), Bretz & Hennigan ("Hennigan"), and Law Offices of Josef D. Cooper ("Cooper"). Stoll, Hennigan and Cooper immediately thereafter undertook extensive discovery on behalf of plaintiffs, which had not previously been done.

In August 1981, the day after Hennigan took the deposition of the

auditors for Sambo's (Touche Ross & Co., "Touche"), Stoll, Hennigan, Cooper and Stabile filed the first of the instant actions, Emrich, et al v. Touche Ross & Co., No. 81-4104-R ("Touche"). A few weeks later, Stoll, Hennigan and Cooper, without Stabile, filed the second action before this court, Emrich, et al v. Battistone et al, No. 81-4547-R ("Battistone"), against certain former Sambo's directors who had been excluded from the plaintiff class certified in Muller.

Although Stabile was named as counsel in the action against Touche, the Stabile firm did not actively participate in the Touche case, and has never been plaintiffs-petitioners' counsel in Battistone. Latham has never represented any of the individuals who are the named

plaintiffs-petitioners in either Touche or Battistone.

Touche moved to disqualify Stabile on the grounds that Stabile had represented Touche two years earlier in other unrelated litigation and had allegedly obtained confidential information from Touche regarding its auditing procedures. Touche also moved to have all other plaintiffs-petitioners' counsel disqualified because of either a "presumption" that Stabile had disclosed the allegedly confidential information to co-counsel or the "risk" that Stabile might divulge such information to co-counsel in the future.

Declarations, reprinted as Appendix F hereto, were submitted by Stoll, Hennigan and Cooper stating that no such

confidential communications were disclosed to them. None of these declarations were controverted by any affidavits or other evidence submitted by any party.

The motion to disqualify all counsel was granted by the district court without explanation, and the action was dismissed.

Muller settled shortly after the disqualification order in Touche.

Thereafter, nine of the ten defendants in Battistone moved to disqualify Stoll, Hennigan and Cooper from representing plaintiffs-petitioners in that case. Five of the nine movants submitted declarations that they had given information to Latham (the original counsel in Muller) and had given money to a plaintiffs' committee that had retained

Latham, on the assurance that those five would not be sued. Declarations were submitted, reprinted as Appendix G hereto, by Stabile, Stoll, Hennigan, Cooper, and Latham (by Lance Wickman) to the effect that no confidential information from the Battisone defendants was relayed to them. Defendants submitted no evidence to the effect that any information was given to Stoll, Hennigan or Cooper.

The district court granted the motion, again without explanation, disqualifying Stoll, Hennigan and Cooper from representing plaintiffs-petitioners against all ten of the defendants in Battistone, and dismissing the action. The Battistone plaintiffs-petitioners moved for reconsideration by the district

court, or for an articulation of the basis for such ruling. Reconsideration was denied without explanation or findings of fact or law.

Appeals were taken from the Touche and Battistone rulings and were consolidated for oral argument. The Ninth Circuit panel affirmed the district court's order disqualifying all plaintiffs-petitioners' counsel, and voted to deny petitioners' petition for a rehearing.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE NINTH CIRCUIT'S DECISION DISQUALIFYING COUNSEL IN TOUCHE AND BATTISTONE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND DISREGARDS THE RESULTING SUBSTANTIAL DETRIMENT TO PETITIONERS AND OTHER CLASS MEMBERS

The well-established rule provides that, even if one counsel is properly

disqualified because of prior representation of an adverse party, co-counsel are not disqualified solely on the basis of the co-counsel relationship. Some evidence of co-counsel's receipt of confidential information is necessary. See State of Arkansas v. Dean Foods Products Co., Inc., 605 F.2d 380, 388 (8th Cir. 1979); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 235 (2d Cir. 1977); Akerly v. Red Barn System, Inc., 551 F.2d 539, 543 (3d Cir. 1979); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721-22 (7th Cir. 1982), rehearing denied; In Re Airport Car Rental Antitrust, 470 F. Supp. 495, 505 (N.D. Cal. 1979).

If the appearance of impropriety alone provides the basis for disqualification of co-counsel, a

district court's order of disqualification not based on articulable principles cannot be sustained. The appeals court will affirm such orders only where the impropriety is clear and is one that would be recognized as such by all reasonable persons. In Re Coordinated Pretrial Proceedings, 658 F.2d 1355, 1361 (9th Cir. 1981), cert. denied, 455 U.S. 990 (1982). The Ninth Circuit and other circuits apply a balancing test for determining whether a Canon 9 appearance of impropriety exists:

> The crucial question is whether the concerns expressed are indeed present or merely anticipatory and speculative. In other words, did the court have a basis for finding apparent improprieties that were serious enough to outweigh the parties' interests in being represented by counsel of their choice?

Id. See also Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 609 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1978).

The Ninth Circuit Memorandum disregards these general rules; it conclusively presumes the opposite--that confidential information was transmitted and that an impropriety existed--in total disregard of the uncontradicted declarations that no transmittal of information to co-counsel occurred and in total disregard of the legitimate interests of the clients. By upholding the trial court's discretion on so sketchy a record as appears here, the appellate court opens the door to serious abuse of discretion. The effect is equivalent to a conclusive presumption

which is simply contrary to the law.

The Ninth Circuit Memorandum also disregards the detriment to the plaintiffs-petitioners caused by the disqualification of their chosen counsel.

Generally, when ruling on motions to disqualify, courts should give great weight to considerations of the client's right to choose counsel and the harm to the client caused by an order of disqualification. Disqualification orders harm clients, particularly in cases as complex as these, by causing them to incur losses of time and money. Harmed clients are being forced to retain new counsel who must begin anew by familiarizing themselves with the facts and issues of the cases. These clients lose the benefit of retaining long-time

counsel with specialized knowledge of the clients' situation. See Government of India v. Cook Industries, 569 F.2d 737, 739 (2d Cir. 1978); Jordan, "Disqualifying Lawyers," Litigation (Litigation Section, ABA), Vol. 7, No. 3, at 3 (Spring, 1981).

The petitioners herein have been substantially burdened by the disqualification of their counsel by losing as class counsel the attorneys who had familiarity with the complex legal and factual issues involved. Stoll, Hennigan and Cooper were counsel in Muller. Muller involved the same facts as those underlying these actions. Their involvement with Muller extended until the eve of trial, even to the extent of counsel having filed witness and exhibit lists and jury instructions, when the

Muller case was settled; counsel were intimately familiar with these facts through extensive discovery and trial preparation. The individuals who were class members in Muller are the same as those in Touche and Battistone. Stoll, Hennigan and Cooper had developed a certain rapport with the class. Forcing the class to lose their chosen counsel imposes delay in resolution of their claims as well as substantial additional cost.

In the Touche action, before the court could properly have imposed these burdens on petitioners, it should have carefully scrutinized the record to determine whether a substantial relationship existed between Stabile's earlier representation of Touche and his

minimal involvement in one of the cases now before the court, and, if a relationship was found to exist, whether confidences had in fact been disclosed so that Touche was likely to be unfairly disadvantaged. See Fund of Funds, Ltd., 567 F.2d at 227; Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020, 1029 (5th Cir.), cert. denied, 102 U.S. 394. (1981); Brennan's Inc. v. Brennan's Restaurant, Inc., 590 F.2d 168, 173-174 (5th Cir. 1979). And if the court properly disqualified Stabile, that would have given Touche all the protection it needed. given the representations that Stabile never revealed any Touche secrets to co-counsel.

The court also should have determined whether any "confidential

information" given to Latham by the Battistone defendants was shared with Latham's successor attorney, Stabile, and then passed on to Stoll, Hennigan and Cooper, counsel in the Battistone suit. The need for such a determination is especially meaningful where, as here, the disqualification of counsel is the basis of a dismissal order. The putative class members had their action against these defendants' dismissed on this basis without even having had the prior court approval and class notification to which they were entitled under FRCP 23(e) (see II, infra).

The "information" received by Latham was received during a period when Latham jointly represented the petitioners and the Battistone defendants. As a matter

of law, that information would not be confidential as between jointly represented clients. No confidential information can exist between current adversaries who previously were jointly represented by the same attorney. See Brennan's, Inc., 590 F.2d at 173; Garner v. Wolfinbarger, 430 F.2d 1093, 1103 (5th Cir. 1970), cert. denied sub nom, Garner v. First American Life Insurance Co., 401 U.S. 974 (1971). See also, 8 J. Wigmore, Evidence § 2312 at 603-04 (McNaughton rev. 1961).

If confidential information could exist, no facts were presented to support a transmittal from Latham to present counsel. There is no presumption that confidential information passes to successor counsel. Such a presumption does not even exist with regard to

actual, current co-counsel. See In Re Airport Car Rental Antitrust Litigation, 470 F. Supp. at 503. Such a presumption is even less proper here, because Latham could only have conveyed that information by violating its ethical duties as defendants' former counsel.

Courts and commentators have noted that frivolous motions for disqualification have become "common tools" to achieve ulterior and "purely strategic purposes" where there is no real concern that actual prejudice will result from the challenged representation. See Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977); Community Broadcasting of Boston, Inc. v. Federal Communications Commission, 546 F.2d 1022, 1026-27 (D.C. Cir. 1976);

Woods v. Covington County Bank, 537 F.2d at 813; International Electronics Corporation v. Flanzer, 527 F.2d 1288, 1289 (2d Cir. 1975); In re Airport Car Rental Antitrust Litigation, 470 F. Supp. at 503; Graafeiland, Lawyer's Conflict of Interest - A Judge's View (Part II), N.Y.L.J., July 20, 1977, at 1, col. 2.

When courts can simply disqualify counsel without articulating the basis therefor, the policy reasons for balancing the interests involved are subverted and there arises a serious potential for abuse. At a minimum, plaintiffs-petitioners are entitled to have the court set forth clearly its reasons for disqualification of counsel. The complaining parties herein put forth no evidence to satisfy the requirements of disqualification, yet were well aware

of the disadvantages the class would suffer by the loss of counsel intimately familiar with these actions. By permitting conduct such as this, courts open the door to serious abuse of disqualification motions and the inevitable resulting delays.

II.

IN EFFECTIVELY DENYING THE PUTATIVE MEMBERS OF THE BATTISTONE CLASS THEIR CAUSE OF ACTION ON THE BASIS OF AN AGREEMENT THAT WAS NOT APPROVED BY THE COURT AND NEVER NOTICED TO THE MEMBERS OF THE CLASS, THE NINTH CIRCUIT IGNORED THE RULES OF THE SUPREME COURT AND THE CIRCUIT COURTS OF APPEAL AS SET FORTH IN FRCP 23(e)

In order for any settlement of a class action to be effective, Rule 23(e) of Federal Rules of Civil Procedure requires that (i) notice of such settlement be given to the plaintiff class and (ii) the district court approve

such settlement on evidence before it and after notice and hearing. See Sosna v. Iowa, 419 U.S. 393, 399, n. 8 (1975); Mendoza v. United States, 623 F.2d 1338, 1350 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

Rule 23(e) specifically requires notice and approval when class members agree to dismiss their claims against defendants and potential defendants. Such notice and approval were notably absent herein. Notice of a proposed dismissal to members of the class is required in every class action. 3B J. Moore, Federal Practice ¶ 23.80[2] at 23-506 (2d ed. 1982).

This is true even prior to a court's initial determination as to whether an action brought as a class action is to be so maintained; the action is presumed to

be a class action for purposes of Rule 23(e). 3B J. Moore, supra, ¶ 23.80[2.-1] at 23-509. See Kahan v. Rosensteil, 424 F.2d 161, 169 (3d Cir.), cert. denied, 398 U.S. 950 (1970); Susman v. Lincoln American Corp., 587 F.2d 866, 869 (7th Cir. 1978). Court approval is required even for a dismissal as to only some defendants, the action remaining pending as to other defendants. 3B J. Moore, supra, at 23-508.

There are important reasons behind Rule 23(e). Settlements negotiated between named parties may not necessarily protect the interests of unnamed parties. Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971). The strictures of the rule are necessary to protect the rights of absent

and non-party class members who may be bound or affected by a settlement of their claims by the class representatives. Rodgers v. United States Steel Corp., 70 F.R.D. 639, 642 (W.D. Pa. 1976). Rule 23(e) takes on added importance when considering the nature of a class action. As stated by the Ninth Circuit:

> [T]he attorney for the class is not to be viewed as a negotiator in a process of collective bargaining where the majority rule prevails. The class is not the client. The class attorney continues to have responsibility to each individual member of the class even when negotiating a settlement.

Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832, 834-35 (9th Cir. 1976).

Under the facts of the present case, the moving Battistone defendants at best

demonstrated that Latham, while representing Muller and Anzalone (named plaintiffs in Muller), had obtained information from five of what later became the ten defendants in Battistone, upon an alleged oral assurance by Latham that those five individuals would not be sued. Subsequently, Muller was certified as a class action, and the district court excluded from the plaintiff class all former directors as having potential conflicts of interest with Muller plaintiffs.

No one has ever given notice to the plaintiff class in either Muller or Battistone that settlement was reached between class counsel (Latham) and certain former directors to the effect that, in exchange for information, the former Sambo's directors would not be

sued. Actually, Latham denies that there ever even was an attorney-client relationship between Latham and these former Sambo's directors. See Declaration of L. Wickman, Appendix E hereto. Emrich and Gillberg (named plaintiffs herein) were never clients of Latham, although they subsequently became members of the Muller class.

In order to bind Emrich and Gillberg or any other Muller class member to an agreement not to sue certain former Sambo's directors, it would have been necessary, under Rule 23 Federal Rules of Civil Procedure, to provide class notice, hearing, and a determination by the district court as to the reasonableness and adequacy of such agreement. Because none of this occurred, these plaintiffs

cannot be prevented from prosecuting their claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED:

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Amir Aghaloo
Tony Akl
Steve Andrew
Richard Andrews
J. Robert Andrews
Barbara Anzalone
Seto Avakian
Joe Avoledo
Richard Baker
Robert Bandich
Richard Bandley
Charles Barber
Robert Barger
Arden Barlow
Lewis Bass
Charmaine Bauer
Michael C. Baxter
Kenneth Beck
Fred Becker
Chris Benson
Bill Bester
Louis Bevilacqua
Abdul Bhatti
Brian Bly
William Bohnett
Phillip Boyle
Ken Boren
Donald Bowen
John Boylan
Carrol Brady
Rhett Bray
Clarence Brenneman
Ronald Brenneman
Thomas Briggs

Louis Browdy
Jack Brown
Michael N. Bruce
Ritz Brunello
Ludvik Buric
Gary Burk
Craig Burns
Daniel A. Busby
Kenneth Carlson
Lynn Carlson
George Carranco
Pual Carter
Steven Carter
Richard C. Carver
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M. Bruce Cook
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Tom Derry
Robert G. Dickinson
Ronald Dillon

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Alex Dodds
Don Dolan
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Michael Eanes
Steve Edson
Robert Elliott
Bon Elmerick
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Dan Esmond
Jiom Evans
Robert Ewing
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William D. Fewox
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Barbara P. Fraser
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Ken Friberg
Robert Friday
Shirley Fuller
Les Fullerton
William Gagg
Mary Gamboa
Mary Gamboa
George Gardner

Bob W. Garner
Tom Garyfallou
Charlotte Gaskill
Raymond Gelinas
Vern Gile
Joseph Gillen
Seymour Goldberg
Manuel Gonzales
Don Grandi
Richard Granieri
Frank Granite
Ron Green
John Gregory
David Gronewoller
Woody Guild
Anthony Gunterman
Arthur Gunther
Arthur Gunther
Huhg Haferkamp
Richard Haines
Noel Hales
Noel Halesa
James A. Hall
Jim Hanke
William Hansen
Steve Hardy
Dennis Harman
Larry Hatfield
Alfred Henry
Pat Henry
Mark Herman
Steve Hill
John Hilts
James Hobbs
Tom Holgate
Gene Holt
Frank Horne
John Howard
Henry Huber

Floyd Hunter
Abdul Ibrahimi
Leon Irons
Richard Irvin
Richard Irvin
Bob Jellum
Dave Johnson
Lee Johnson
Charles Jones
Warren Jost
Gunther Junck
Gary Kasprowicz
Wayne Kees
Craig Kessler
Steve Kirby
Jan Klopp
Bob Knowlen
Gary Kreeck
Robert Kucera
Richard Kurzna
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Harold Large
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Howard Larson
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Arvan Leany
Vincent Leifer
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Rodney Lincoln
Larry Lindell

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Earl Ludwig
Tom Lumsden
Randy Lyle
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David McAfee
Mike McAllister
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Terry McCormack
Marvin McElhiney
Kelly McGuire
Charles McIntyre
Robert H. McKenerich
James R. McMahan
Ken Macaulay
Michael MacKenzie
Guy Maddox
John Mangan
H. Marter
Dave Mattingly
Steve Meeker
Ed Meeks
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Steve Merchant
Russell Merrick
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Dorothy Mimms
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James Mitchell
Buck Moorehead
Jorgen Mortensen
Morton Moskowitz
Darrel Mowry

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Ron Negrete
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Leon Nesbitt
Nello Nicioli
Jeffrey Nordstrom
Robert Obici
Tom O'Brien
Forrest O'Neil
Ted Ontiveros
John Opperman
Alan Parsons
Brian Patterson
George Paulson
Curtis Pearce
Thomas Peavey
Jose S. Perez
Augy Perry
James Perry
Paul Peters
Donald Peterson
Walter Pfeffer
Richard Phillips
Benny Plambek
Harvey Pleiman
Howard Pommerening
Ms. Kim Porter
Joe Prevedello
Oscar Price
Herb Purvis
Rodney Putz
Mike Quinn
Louise Ramsey
Mark Randolph

J.T. Rankin
Donald Rast
Ed Rawles
William Reiman
George Reiswig
Jose Reyes
Tony Reynolds
John Reynolds
Richard Rhinesmith
Larry Richins
C.R. Rider
Roy Ridgeway
Robert Robertson
Al Rodin
Joe Rodiquez
William Roe
Pieter Roelofs
Pieter Roeloffs
Brian Rosborough
Jack Rose
Mike Rose
Martin Arthur Ruff
Armand Ruocco
Richard Rush
Dave Rybar
Bob Salcedo
John Sanchez
Kenneth Sarkis
Leonard Scamardo
Norm Scanlon
Gerald L. Scharton
Lee Schlesinger
Emil Schultz
William Schultz
Robert Schurtz
Howard Scott
Bill Scott
Leon Sequeira
Richard Seron

John Shanks
Joseph Shaw
Robert Sheker
Howard Shepherd
P. Shipley
Ilsoon Shinn
Dennis Shoemaker
Julie Shores
Jerry Sigler
Steve Sill
Peter Sirkin
Paul Siverhus
Jeff Smith
Larry Smith
Jack Sopkin
Ron Soteros
Bob Stammer
Arnold Stanfield
Randy Starrett
Don Stathos
Dennis Steed
James Stewart
John Stirling
S.Z. Stoltzfus
Daniel Strout
Dennis Strunk
Ernie Suggett
John Sullivan
Montri Suriyamont
Greg Swehla
Robert Tai
William Tatham
Mark Tharp
Joseph Theriault
Dan Thomas
Phillip Thomas
Gerald Thompson
Pat Tracy
Michael Trainor

Don Turner
Joe Tyler
Ken Underatich
Ann Van Heusden
Billy Veenstra
Richard Wacker
Eric Wagner
Bill Wagner Jr.
Charles Walmsley
Nick Weber
Don Weinstock
Charles Wenkus
Larry Wenning
Al West
Mary Weston
John Wheeler
Robert Whitehouse
Kyle Whitley
Booker T. Williams
Robert Williams
William S. Williams
Buzz Wires
Steve Wiseman
Roger Wolfe
Charade Wongsri
Dough Worsley
Mel Worton
John Wright
William Wright
Eugene Wulf
Ted Yang
Al Yoko
Paul Young
Eddie Yuan
John Zanotti

FILED

Nov 9 1981

Clerk, U.S. District Court Central District of California

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Attorneys for Defendant Touche Ross & Co.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND ERIC GILLBERG,	)	No. 81 4104 R
Plaintiffs,	)	ORDER
TOUCHE ROSS & CO.,	)	DISQUALIFYING LAW FIRMS AND

) STRIKING
Defendant.) COMPLAINT

The Motions of defendant, Touche Ross & Co. to Disqualify Law Firms and to Strike Complaint or in the Alternative to Dismiss Count Four of the Complaint came on regularly for hearing on Monday, November 2, 1981 in the Courtroom of the Honorable Manuel L. Real, Judge Presiding, in the above-entitled Court. Howard P. Miller, a member of, and Lorraine B. Moura, an associate of, Buchalter, Nemer, Fields, Chrystie & Younger, appeared on behalf of defendant and moving party, Touche Ross & Co. Gary D. Stabile of Mullin [sic] & Stabile and Josef D. Cooper, of the law offices of Josef D. Cooper, P.C. appeared on behalf of Phillip Emrich and Eric Gillberg.

After full consideration of the

papers filed in connection with the motions and the oral argument of counsel, and being fully advised of the premises:

IT IS ORDERED that the defendant Touche Ross & Co.'s, Motion to Disqualify Law Firms is granted as to all law firms representing plaintiffs herein.

IT IS FURTHER ORDERED that defendant Touche Ross & Co.'s Motion to Strike the Complaint is granted without prejudice.

Dated: November 9, 1981.

MANUEL L. REAL

MANUEL L. REAL,
UNITED STATES
DISTRICT COURT
JUDGE

GARY R. RICKS
WILLIAM W. WATTS
PRICE, POSTEL & PARMA
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Attorneys for Defendants, SAM BATTISTONE, SR.; SAM D. BATTISTONE, JR.; F. NEWELL BOHNETT; OWEN JOHNSTON; WILLIAM L. WAGNER, SR.; GEORGE McKAIG; and BRUCE N. ANTICOUNI

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH, et al., Plaintiffs, v. SAM BATTISTONE, SR.; et al.,	No. CV 81-4547R (JRx) JUDGMENT ON DECISION BY THE COURT

Defendants.)

This action came on for hearing of Defendants' Motion for Order Disqualifying Law Firms; to Dismiss the Complaint, for Order Enjoining the Representation of Conflicting Interests and the Disclosure of Confidential Information on January 18, 1982 before the Court, Honorable Manuel L. Real, District Judge, presiding. The issues having been duly heard and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED: 1) that the plaintiffs' counsel be disqualified from representing plaintiffs in this action; and 2) that this action be and is dismissed [without prejudice (amended nunc pro tunc, 2/11/82)]; and 3) that the parties shall bear their own costs and

fees incurred herein.

Dated at Los Angeles, California, this 25th day of January, 1982.

[signed]

MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

FILED

Jun 30 1983

Phillip B. Winberry Clerk U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILLIP EMRICH and ERIC GILLBERG, Appellants, vs. TOUCHE ROSS & CO., Appellees.	No. 81-5940 D.C. No. CV 81-4104 R
PHILLIP EMRICH, et al., Appellants, vs. SAM BATTISTONE, SR., et al., Appellees.	No. 82-5356 D.C. No. CV 81-4547 R MEMORANDUM

Appeal from the United States
District Court for the
Central District of California

District Judge Manuel L. Real, Presiding
Argued and Submitted November 1, 1982

Before: CHAMBERS, ROBB* and ALARCON, Circuit Judges.

These are related cases which were heard together and sua sponte we decide them in a single Memorandum. Both cases arose out of the issuance of securities of Sambo's Restaurants, Inc. (hereafter "Sambo's"). Both appeals center about the district court's orders dismissing the complaints without prejudice and disqualifying counsel for the class represented by Emrich and Gillberg.

The attempted appeals from the portion of the orders dismissing the actions without prejudice are not from final orders and we are without appellate

* The Honorable Roger Robb, United States Circuit Judge for the District of Columbia Circuit, sitting by designation.

jurisdiction over that aspect of the attempted appeals. However, to the extent the orders relate to the disqualification of counsel, we do have appellate jurisdiction. In re Coordinated Proceedings in Petroleum Products Antitrust Litigation, 658 F.2d 1355 (9th Cir. 1981), cert. den. 455 U.S. 990 (1982). We thus direct our discussion to the disqualification issue.

In late 1977, and continuing into 1978, activities were undertaken to issue securities in connection with the expansion of Sambo's Restaurants. Plaintiffs claim to represent a class of purchasers of the securities. The defendants in Battistone formerly served in management postitions in Sambo's, but they were also among those who purchased the securities in question. In the early

stages of exploring potential litigation, they were approached and solicited to assist, and did assist, in the financing of the litigation. This was done with specific assurance, from counsel for the class representatives, that they would not be sued. In 1980, an action was filed against Sambo's and certain financing banks, entitled Muller et al v. Sambo's Restaurants, Inc. et al, No. 80-3757-R (hereafter "Muller"). Consistent with the assurances that had been given, none of them was named as a defendant in that action.1/

1/ The description of the class in Muller was such that the Battistone defendants could be interpreted as being within the class represented by the plaintiffs; they were forally excluded from the Muller class at a later date. Sambo's has since filed for bankruptcy.

Several months after the filing of the Muller complaint, the class attorneys were substituted out in favor of the law firm of Mullen & Stabile. Soon thereafter Mullen & Stabile associated Josef D. Cooper (now succeeded by Cooper, Kirkham & Mckinney), and the law firms of Bretz & Hennigan and Stoll & Stoll. Mullen & Stabile and their three associated firms continue to represent the class in Muller.

In August 1981, the four firms joined to file a new action against Touche Ross & Co., a partnership of certified public accounts, charging the firm with conducting improper audits, mainly through its Los Angeles office. All four firms continue to represent the class in Touche Ross, herein.

In September 1981, the three

associated firms filed an action against the Battistone defendants. Mullen & Stabile are conspicuous by their absence as counsel of record. Counts I through III of the Battistone complaint are virtually the same as those in Muller. In addition, a fourth count was added asserting a civil claim under the Racketeer Influenced and Corrupt Organizations Act of 1970. (The attempt to amend Muller to add such a count had been rejected by the district court.)

The defendants in the two actions now on appeal (Touche Ross and Battistone) moved to disqualify counsel for the class. The motion to disqualify was granted, motions to reconsider were denied, and these appeals followed.

The standard for our review of the

disqualification of attorneys is whether the district court abused its discretion. The district court has the primary responsibility for controlling the conduct of lawyers practicing before it. Unified Sewerage Agency, etc. v. Jelco Incorporated, 646 F.2d 1339, 1351 (9th Cir. 1981). The district court's order disqualifying counsel will not be disturbed if the record reveals "any sound basis" for the order and reversal is appropriate only if the district court "misperceives the law or does not consider relevant factors and thereby misapplies the law." In re Coordinated Proceedings, etc., supra, 658 F.2d at 1358. We find no abuse of discretion and appellants have demonstrated no misconception of the law in either of these appeals. We note, at the outset,

that both cases, as well as Muller, were assigned to the same district judge. He was thus in a unique position to observe the nature and the participation of counsel, thus far, as those cases have proceeded through his court.

The Touche Ross Appeal:

Gary Stabile of Mullen & Stabile defended Touche Ross as late as mid-1979, in a professional misconduct case cenered mainly around the firm's Los Angeles office -- the same Touche Ross office that is involved in the Sambo's litigation. Moreover, he represented Touche Ross during the precise period that the events which are complained of in this appeal allegedly occurred. Affidavit evidence presented by Touche Ross states that Stabile had access to

its audit conversations with partners and employees in the accounting firm which were privileged, confidential and related to proprietary information. He received $250,000 in legal fees for his representation of Touche Ross in that case.

In August 1981, he took the deposition of an official at Touche Ross and, while there is some conflict as to the precise course of events, an affidavit offered by Touche Ross indicates that it believed its deposition was being taken as a third party witness until the day of the deposition when it became apparent that Stabile was considering suing his former client. Indeed, he filed the complaint in the case the very next day -- within hours of the deposition.

We find no abuse of discretion in the disqualification of Mullen & Stabile; the district judge's order was well within the intent of Rule 4-101 of the Rules of Professional Conduct of the State Bar of California, which under Local Rule 1.3(d) of the United States District Court for the Central District of California is adopted for use in that court. See Chambers v. Superior Court, 121 Cal. App.2d 893 (1981). It was similarly within the intent of Canon 9 of the Model Code of Professional Responsibility of the American Bar Association. See In re Coordinated Proceedings, etc. supra, 658 F.2d at 1360-1361. The disqualification order, as to associated counsel, given the representational history of these several

cases, was also well within the district judge's discretion under Rule 1.3(d) and Canon 9.

We are not persuaded by appellants' argument that the former client had the duty to disclose, detail by detail, how the former litigation "related" to the matters charged in the Sambo's litigation. The record fully supports the district court's exercise of discretion to protect the former client who had done nothing to give consent to thhis present adverse representation by its former counsel.

The Battistone Appeal:

In the Battistone appeal the district judge had before him affidavit evidence in support of the motion for disqualification stating unequivocally that confidential information had been

given by the Battistone defendants to the original attorneys representing the class. Mr. Stabile substituted in, in place of those attorneys. He is conspicuously absent as counsel of record in Battistone but he and his associated counsel appear of record together in both Muller and Touche Ross. Opposed to the affidavits supplied by the Battistone defendants, was an affidavit from an attorney associated with the original (now substituted out) firm, denying that he had received confidential information and denying that he had corresponded on certain dates with the attorneys now representing the class in Battistone. Nothing is said by him as to communications, if any, with Mullen & Stabile. It is also noted that this

affidavit was first filed with appellants' motion for reconsideration, after the filing of the order for disqualification.

We have read the carefully worded affidavits and we have reviewed the record as a whole and we are confinced that, consistent with our usual practice, we should not interfere in the district judge's resolution of matters of credibility as to the factual issues underlying this decision to disqualify counsel. Moreover, we are not persuaded, on this record, that the Battistone defendants were required to carry a higher burden of proof as to the communication of confidentialities, proof which could only be speculative and which, by its disclosure, might result in the very violation of confidence that the

Rules of Professional Conduct are intended to protect. On the facts of this case, the district judge was not prohibited from acknowledging the relationship between Mullen & Stabile and the law firms it associated in the Sambo's cases, and was not prohibited from speculating on the reasons whhy the quartet had, for this case alone, become a trio.

With our affirmance of the disqualification of counsel based on these reasons, we need not reach the disturbing issue of the fourth member of the quartet in Muller and Touche ross stepping aside from formal representation of the class in Battistone, only to hear the remaining trio argue they were free to repudiate concrete assurances, given

by original class counsel, that the Battistone defendants would not be sued.

Counsel for the class in Battistone sought a reconsideration of the order for disqualification and, in the disposition of that motion, sanctions were imposed against counsel in the sum of $250.00. We agree with them that there was insufficient notice and opportunity for them to oppose that action by the district judge.

The appeals in both cases, insofar as they seek to appeal from the dismissal of the actions without prejudice, are dismissed. The orders for disqualification are affirmed. The order, in Battistone, for sanctions is reversed and the case is remanded for the limited purpose of permitting a hearing.

If there is to be an appeal on the

results of this limited remand, the case will be returned to the same panel here.

FILED

Sep 27 1983

Phillip B. Winberry Clerk U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILLIP EMRICH, and ERIC GILLBERG, Appellants, vs. TOUCHE ROSS & CO., Appellees.	)	No. 81-5940
PHILLIP EMRICH, et al., Appellants, vs. SAM BATTISTONE, SR., et al., Appellees.	)	No. 82-5356
	)	ORDER DENYING PETITION FOR REHEARING

Before: CHAMBERS, ROBB and ALARCON,

Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Alarcon has voted to reject the suggestion for a rehearing en banc, and Judges Chambers and Robb have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND ERIC GILLBERG,	)	Case No. CV 81-4104
Plaintiffs,	)	
v.	)	DECLARATION OF N. ROBERT STOLL
TOUCHE, ROSS & CO.,	)	
Defendant.	)	

I, N. Robert Stoll declare:

1. I am an attorney at law duly licensed to practice before and admitted to practice before all courts in the State of Oregon and admitted to practice before this court in this matter. I am a member of the firm of Stoll & Stoll, P.C. one of attorneys for plaintiffs Phillip Emerick [sic] and Eric Gilberg

[sic]. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' co-counsel in the action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al. No. CV 80-3757-R (JRX) (the "Muller case".) Gary Stabile of the firm of Mullen & Stabile, is also one of plaintiffs' co-counsel in the Muller case.

3. At no time during the course of my representation of the plaintiff class in the Muller case or this case or in any other connection did Mr. Stabile provide any information to me regarding Touche Ross & Co. The decision to file this action against Touche Ross was made solely by Messers. Hennigan, Cooper and

myself. Mr. Stabile did not participate in the discussions leading to that decision, and it was in no way based on any information provided by or consultation with Mr. Stabile.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Beverly Hills, California this 22nd day of October, 1981.

[signed]

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PHILLIP EMRICK [sic] AND ERIC GILLBERG,	)	Case No. CV 81-4104 IH
Plaintiffs,	)	
vs.	)	DECLARATION OF J. MICHAEL HENNIGAN
TOUCHE ROSS & CO.,	)	
Defendant.	)	

DECLARATION OF J. MICHAEL HENNIGAN

I, J. Michael Hennigan, declare:

1. I am an attorney at law duly authorized to practice before this Court in this matter and licensed to practice before all courts in the State of California. I am a member of the firm of Bretz and Hennigan, one of attorneys for plaintiffs Phillip Emerick [sic] and Eric Gillberg. I have personal knowledge of

the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' counsel in the action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al. No. CV 80-3757-R (JRx) (The "Muller case".) Gary Stabile of the firm of Mullen & Stabile is also one of plaintiffs' counsel in the Muller case.

3. At no time during the course of my representation of the plaintiff class in the Muller case or in this action have I discussed with Mr. Stabile his former representation of Touche Ross & Co. Moreover, Mr. Stabile has not provided me with any information whatsoever regarding Touche Ross.

4. The decision to file the present action against Touche Ross was made solely by Messers. Josef D. Cooper, N. Robert Stoll and myself. Mr. Stabile did not participate in the discussions leading to this decision, nor was it based on any information provided by Mr. Stabile or any consultation with Mr. Stabile.

5. On August 11, 1981 I represented plaintiffs in the Muller case during the deposition of Mr. Richard Herrinton, who tesitifed on behalf of Touche Ross. Prior to commencing the deposition I informed counsel for Mr. Herrinton, Jay R. Ziegler, Esq., that plaintiffs considered it a possibility that a lawsuit against Touche Ross, based upon transactions which are being litigated in the Muller case, might be appropriate. I further

stated that the testimony of Mr. Herrinton would be determinative of whether a lawsuit against Touche Ross would be appropriate.

5. [sic] After Mr. Herrinton had responded to a number of questions regarding Sambo's Restaurants, Inc., a break in the deposition was taken, at which time I stated to Mr. Ziegler that it appeared that, in light of Mr. Herrinton's testimony, a lawsuit against Touche Ross appeared appropriate and that it was almost certain that plaintiffs would file such a lawsuit.

6. [sic] Following notice to Mr. Ziegler of plaintiffs' intention, Mr. Ziegler refused to allow the deposition to continue.

7. [sic] A complaint against

Touche Ross & Co. was prepared that afternoon and evening and the following afternoon.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California this 23rd day of October, 1981.

[signed]

J. Michael Hennigan

FILED

Oct 23 1981

Clerk,
U.S. District
Court Central
District of
California
By _____
Deputy

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UNITED STATES DISTRICT COURT

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PHILLIP EMRICK [sic] AND ERIC GILLBERG,	)	Case No. CV 81-4104 IH
Plaintiffs,	)	
vs.	)	DECLARATION OF JOSEF D. COOPER
TOUCHE ROSS & CO.,	)	
Defendants.	)	

DECLARATION OF JOSEF D. COOPER

I, Josef D. Cooper, declare:

1. I am an attorney at law duly authorized to practice before this Court in this matter and licensed to practice before all courts in the State of California. I am a shareholder of the firm of Law Offices of Josef D. Cooper, P.C., one of attorneys for plaintiffs Phillip Emerick [sic] and Eric Gillberg.

I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' counsel in the action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al. No. CV 80-3757-R (JRx) (The "Muller case".) Gary Stabile of the firm of Mullen & Stabile is also one of plaintiffs' counsel in the Muller case.

3. At no time during the course of my representation of the plaintiff class in the Muller case or in this action have I discussed with Mr. Stabile his former representation of Touche Ross & Co. Mr. Stabile has not provided me with any information whatsoever regarding Touche

Ross. I was not aware of Mr. Stabile's former representation of Touche Ross until I received copies of Touche Ross's motions in this action.

4. The decision to file this action against Touche Ross was made solely by Messrs. Hennigan, Stoll, and myself. Mr. Stabile did not participate in the discussions leading to this decision, nor was it based on any information provided by or consultation with Mr. Stabile.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California this 23rd day of October, 1981.

[signed]

Josef D. Cooper

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND ERIC GILLBERG, Plaintiffs, v. SAM BATTISTONE, SR.; SAM D. BATTISTONE, JR.; F. NEWELL BOHNETT; ROBERT HILD; OWEN JOHNSTON; WILLIAM L. WAGNER, SR., GEORGE McKAIG; DANN V. ANGELOFFF; GEORGE A. CAVELLETTO; and BRUCE N. ANTICOUNI; Defendants.	No. CV 81-4547(JRx) DECLARATION OF GARY D. STABILE

I, Gary D. Stabile, declare:

1. I am an attorney at law duly authorized to practice before this court and licensed to practice beefore all courts in the State of California. I am a member of the firm of Mullen & Stabile.

2. I am one of plaintiffs' counsel in a related action before this court entitled James Muller, et al. v. Sambo's

Restaurants, Inc., et al., No. CV 80-3757-R (JRx) (the "Muller" case). By order of this court dated April 8, 1981 the firm of Mullen & Stabile was substituted as plaintiffs' attorney of record in this action in the place of Latham & Watkins. The firm of Mullen & Stabile never acted as co-counsel with the firm of Latham & Watkins in the representation of the Muller action.

3. At no time either before or during the course of my representation of the plaintiffs in the Muller case has the firm of Latham & Watkins provided me with confidential information whose source was identified as any of the defendants in this action. I have not relayed any information to Messrs. Cooper, Hennigan, or Stoll which was obtained from Latham &

Watkins regarding any of the defendants herein.

4. I did not participate in any discussion leading to the decision to file this action against these defendants.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California this 8 day of January, 1982.

[signed]

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND ERIC GILLBERG, Plaintiffs, v. SAM BATTISTONE, SR.; SAM D. BATTISTONE, JR.; F. NEWELL BOHNETT; ROBERT HILD; OWEN JOHNSTON; WILLIAM L. WAGNER, SR., GEORGE McKAIG; DANN V. ANGELOFFF; GEORGE A. CAVELLETTO; and BRUCE N. ANTICOUNI; Defendants.	No. CV 81-4547(JRx) DECLARATION OF N. ROBERT STOLL

I, N. Robert Stoll declare:

1. I am an attorney at law fuly licensed to practice before and admitted to practice before all courts in the State of Oregon and admitted to practice before this court in this matter. I am a member of the firm of Stoll & Stoll, P.C. one of the attorneys for plaintiffs

Phillip Emrich and Eric Gillberg. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' co-counsel in a related action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al., No. CV 80-3757-R(JRx) (the "Muller" case). I am also plaintiffs' counsel in John L. Hilts v. Sambo's Restaurants, Inc., et al., No. CV 81-147-R(JRx) (the "Hilts action") and Robert C. Robertson v. Sambo's Restaurants, Inc., et al., No. CV 81-153-R(JRx) (the "Robertson action"), which were transferred from the District of Oregon and consolidated with the Muller case. Prior to my being added as one of plaintiffs' counsel in the Muller case, the plaintiffs were represented solely by

the firm of Mullen & Stabile, and prior to that solely by the firm of Latham & Watkins.

3. On January, 1981, shortly after the Hilts and Robertson actions were transferred to this court from the District of Oregon, I met with Lance Wickman of Latham & Watkins. At that time the firm intended to resign from the Muller case. I did not receive from that firm then, or at any time, any deposition transcripts, other documents, or any substantive information regarding the merits of the Muller action.

4. At no time during the course of my conversation with Mr. Wickman, or at any other time, did Mr. Wickman or any other member of the firm of Latham & Watkins communicate any personal

information to me regarding those persons named as defendants in this action. Neither have Messrs. Mullen or Stabile communicated to me any information regarding these defendants which, to my knowledge, they obtained from Latham & Watkins.

5. The decision to file this action against these defendants was based upon information gained by me and my co-counsel in the course of discovery in the Muller case. No member of the firm of Latham & Watkins participated in the discussions leading to that decision, nor was that decision based upon any information provided by, or consultation with, the firm of Latham & Watkins.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sun River, Oregon this

31 day of December, 1981.

[signed]

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND ERIC GILLBERG, Plaintiffs, v. SAM BATTISTONE, SR.; SAM D. BATTISTONE, JR.; F. NEWELL BOHNETT; ROBERT HILD; OWEN JOHNSTON; WILLIAM L. WAGNER, SR., GEORGE McKAIG; DANN V. ANGELOFFF; GEORGE A. CAVELLETTO; and BRUCE N. ANTICOUNI; Defendants.	No. CV 81-4547(JRx) DECLARATION OF J. MICHAEL HENNIGAN

I, J. Michael Hennigan, declare:

1. I am an attorney at law duly authorized to practice before this court in this matter and licensed to practice before all courts in the State of California. I am a member of the firm of Bretz & Hennigan, one of attorneys for plaintiffs Phillip Emrich and Eric

Gillberg. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' counsel in a related action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al., No. CV 80-3757-R(JRx) (the "Muller case"). Prior to the time I was added as plaintiffs' counsel in the Muller case, plaintiffs were represented solely by the firm of Mullen & Stabile, and prior to that time solely by the firm of Latham & Watkins.

3. At no time either before or during the course of my representation of the plaintiffs in the Muller case have I had any discussions with any member of the firm of Latham & Watkins. Latham & Watkins has not provided me with any

information whatsoever regarding the prosecution of the Muller case, or the facts or legal theories known to or discovered by Latham & Watkins during or in preparation of their representation of the Muller plaintiffs. Neither has any information been relayed to me by Messrs. Mullen or Stabile which, to my knowledge, was obtained from Latham & Watkins regarding any of the defendants herein or any aspect of this litigation.

4. The decision to file this action against these defendants was based upon information gained in the course of discovery undertaken by me and my co-counsel in the Muller action. No member of the firm of Latham & Watkins participated in any discussion leading to that decision, nor was that decision

based upon any information provided by, or consultation with, any member of the firm of Latham & Watkins.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California this 2d day of January, 1982.

[signed]

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND ERIC GILLBERG, Plaintiffs, v. SAM BATTISTONE, SR.; SAM D. BATTISTONE, JR.; F. NEWELL BOHNETT; ROBERT HILD; OWEN JOHNSTON; WILLIAM L. WAGNER, SR., GEORGE McKAIG; DANN V. ANGELOFFF; GEORGE A. CAVELLETTO; and BRUCE N. ANTICOUNI; Defendants.	No. CV 81-4547(JRx) DECLARATION OF JOSEF C. COOPER

I, Josef D. Cooper, declare:

1. I am an attorney at law duly authorized to practice before this court in this matter and licensed to practice before all courts in the State of California, and am one of the attorneys for plaintiffs Phillip Emerich and Eric Gillberg. I have personal knowledge of

the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' counsel in a related action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al., No. CV 80-3757-R(JRx) (the "Muller case"). Prior to the time I was added as plaintiffs' counsel in the Muller case, plaintiffs were represented solely by the firm of Mullen & Stabile, and prior to that time solely by the firm of Latham & Watkins.

3. At no time either before or during the course of my representation of the plaintiffs in the Muller case have I had any discussions with any member of the firm of Latham & Watkins. Latham & Watkins has not provided me with any information whatsoever regarding the

prosecution of the Muller case, or the facts or legal theories known to or discovered by Latham & Watkins during or in preparation of their representation of the Muller plaintiffs. Neither has any information been relayed to me by Messrs. Mullen or Stabile which, to my knowledge, was obtained from Latham & Watkins regarding any of the defendants herein or any aspect of this litigation.

4. The decision to file this action against these defendants was based upon information gained in the course of discovery undertaken by me and my co-counsel in the Muller action. No member of the firm of Latham & Watkins participated in any discussion leading to that decision, nor was that decision based upon any information provided by,

or consultation with, any member of the firm of Latham & Watkins.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California this 4th day of January, 1982.

[signed]

Josef D. Cooper

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND ERIC GILLBERG, Plaintiffs, v. SAM BATTISTONE, SR.,; SAM D. BATTISTONE, JR.; F. NEWELL BOHNETT; ROBERT HILD; OWEN JOHNSTON; WILLIAM L. WAGNER, SR.; GEORGE McKAIG; DANN V. ANGELOFF; GEORGE A. CAVELLETTO; and BRUCE N. ANTICOUNI; Defendants.	No. CV 81-4547 (JRx) DECLARATION OF LANCE B. WICKMAN

I, Lance B. Wickman, declare:

1. I am an attorney licensed to practice in the State of California and

before this Court and I am a member of the firm of Latham & Watkins, which formerly was counsel of record for plaintiffs in the action entitled Muller, et al. v. Sambo's Restaurants, Inc., et al., No. CV 80-3757-R(JRx) ("the Muller case"). I am competent to testify. The facts set forth herein are of my own personal knowledge, and if called upon to do so I could and would do so as set forth herein.

2. Latham & Watkins was first retained by a steering committee of two associations, JV Group Association and JV 77-78 Group Association, to represent them in a dispute with Sambo's Restaurants, Inc. ("SRI"), United California Bank (now First Interstate Bank) and Crocker Bank in approximately

April 1980. The two organizations were loose associations of persons who had invested in various group joint ventures and restaurant joint ventures sponsored by SRI. As I recall, the steering committee members with whom we dealt were Robert Elmerick and Oliver Dixon and, to a lesser extent, Helene Sullivan. None of the defendants in this action to my knowledge were members of the steering committee or in any way involved in the management of these two associations.

3. At the request of the steering committee and the named plaintiffs in the Muller case, we filed the Muller action, opposed motions to dismiss by the defendants in that action and moved for certification of the class. One of the contentions raised by defendant SRI in opposition to class certification was

that Latham & Watkins could not be certified as class counsel because allegedly certain members of these associations which Latham & Watkins represented (former officers and directors) had interests adverse to putative class members. As mentioned in the reply memorandum filed by Latham & Watkins and by me at the hearing, that contention was totally without merit since none of those who had been directors or corporate officers of SRI, and thus potentially subject to liability, were in any way involved in the representation of the class or the management of the associations. The Court evidently agreed that the contention lacked merit because it certified the class and Latham & Watkins

as class counsel and expressly excluded former officers and directors from the class.

4. To my knowledge I have not even met any of those persons named as defendants in this action, much less received any confidential communications from them.

5. In or about February 1981 I met briefly with Mr. N. Robert Stoll, one of plaintiffs' counsel in this action, prior to attending a meeting of all counsel in the Muller case regarding a discovery schedule. The sole purpose of my discussion with Mr. Stoll was to coordinate our respective lists of prospective deponents since at the time he was representing plaintiffs in two actions related to, and in the process of consolidation with, the Muller case. I

did not discuss with him any other information received from our clients, and obviously could not have discussed any "confidential information" from defendants here since, as mentioned, I never received any.

6. Similarly, I never communicated any such confidential information to Messrs. Mullen and Stabile when they succeeded Latham & Watkins as class counsel.

Executed at San Diego, California on January 6, 1982.

I declare under penalty of perjury that the foregoing is true and correct.

[signed]

Lance B. Wickman

No. 83-1050

IN THE

Supreme Court of the United States

October Term, 1983

PHILLIP EMRICH and ERIC GILLBERG,

Petitioners,

vs.

TOUCHE ROSS & CO.,

Respondent.

PHILLIP EMRICH and ERIC GILLBERG,

Petitioners,

vs.

SAM BATTISTONE, SR., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Question Presented.

Assuming proper disqualification of a plaintiff's counsel, did the District Court's disqualification of co-counsel, under the surrounding facts and circumstances, constitute an abuse of discretion?

Parties to the Proceeding.

Although Petitioners allege that they are the named representatives for a class of 375 members in two actions consolidated for argument and decision, *Phillip Emrich and Eric Gillberg v. Touche Ross & Co.* was never certified as a class action.

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No. 83-1050

IN THE

Supreme Court of the United States

October Term, 1983

PHILLIP EMRICH and ERIC GILLBERG,

Petitioners,

vs.

TOUCHE ROSS & CO.,

Respondent.

PHILLIP EMRICH and ERIC GILLBERG,

Petitioners,

vs.

SAM BATTISTONE, SR.; *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

This Brief in Opposition, on behalf of Respondent Touche Ross & Co. ("Touche"), addresses only the action known as *Phillip Emrich and Eric Gillberg v. Touche Ross & Co.*, No. 81-5940, D.C. No. CV 81-4104R. Touche is not a party to the action known as *Phillip Emrich and Eric Gillberg v. Sam Battistone, Sr., et al.*

I.
OPINIONS BELOW.

The Order of the District Court for the Central District of California is unreported. The Memorandum of the Court of Appeals for the Ninth Circuit which Petitioners ask this Court to review is also unreported, as is the Court of Appeals' Order Denying Petition for Rehearing. The District Court's Order and the Court of Appeals' Memorandum and Order are set out in the Appendix to the Petition for Certiorari ("Petitioner's Appendix").

II.
JURISDICTION OF THIS COURT.

Touche contends that this Court should not exercise the jurisdiction conferred upon it under 28 U.S.C. §1254(1) for the following reasons.

1. None of the Opinions below are reported. Therefore they have no precedential value.

2. The issue as framed by Petitioners is:

> "1. May a party's chosen counsel be automatically disqualified *solely* because of a prior representation by co-counsel of an adverse party?"

That is a non-issue. Touche agreed in its appellate brief, and presently agrees, that the answer to that question is: "no". However, that answer does not presently resolve and would not have resolved the issues before the Ninth Circuit Court of Appeals ("Ninth Circuit").

The issues on appeal relevant to the Petition were: (1) whether the disqualification of Mullen & Stabile was an abuse of the trial court's discretion, and if not; (2) whether the disqualification of Mullen & Stabile's co-counsel under the surrounding facts and circumstances was an abuse of the trial court's discretion.

3. This Court has previously held that the question presented to this Court must be a distinct point or proposition of law; that it must not be a question of fact or of mixed law and fact. *Felsenheld v. United States* (1902) 186 U.S. 126.

The ultimate question of the propriety of the disqualifications is one which can only be resolved after deciding various preliminary issues and upon examination of all of the facts presented to the District Court. This Court previously stated that it will not do so. *Pflueger v. Sherman* (1934) 293 U.S. 55.

4. It is clear and previously decided law, in this and other circuits, that counsel and co-counsel may be disqualified under proper circumstances. Thus, the Ninth Circuit's Decision is not in conflict with its reported decisions or those of other circuits. *Trone v. Smith*, 621 F.2d 994 (1980); *In Re Airport Car Rental Antitrust Litigation*, 470 F.Supp. 495 (N.D. Cal. 1979); *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977).

5. The Ninth Circuit's Memorandum of Decision rested in part on state law. Rule 4-101, *infra* p. 10.

Based on the foregoing and the facts and law set forth below this Court should decline jurisdiction and deny the Petition.

III.
STATEMENT OF THE CASE.

On or about August 12, 1981 Petitioners filed a purported class action against Touche for alleged violations of Federal and California securities laws, common law fraud and violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. §1961 *et seq.*, allegedly arising from Touche's preparation of financial statements

for inclusion in prospectuses disseminated by Sambo's Restaurants, Inc. ("Sambo's") in connection with the sale of partnership interests in restaurant joint ventures.

At that time, also pending in the United States District Court for the Central District was a class action by *James Muller, et al. v. Sambo's Restaurants, Inc., et al.*, Case No. CV 80-3757R (JRX) ("*Muller*"). *Muller* was based on the same transactions as this action, but Touche was not a defendant. All counsel for Petitioners in this Action were also attorneys for plaintiffs in *Muller*.[1]

In response to the Complaint, Touche moved to disqualify all of Petitioners' counsel based on the facts in the declarations of Norman C. Grosman, a partner in Touche (Appendix A) and Jay Ziegler, a member of Buchalter, Nemer, Fields, Chrystie & Younger, attorneys for Touche. (Appendix B).

Touche is a partnership of certified public accountants. (Appendix A at ¶2).

Prior to 1974, while Stabile was an associate with the firm of Gibson, Dunn & Crutcher, he performed services for Touche. In or about 1974 Stabile ceased his association with Gibson, Dunn & Crutcher and formed an office for the practice of law under the name of Mullen & Stabile. (Appendix A at ¶¶4 and 5).

When Mullen & Stabile was formed, Stabile was actively defending Touche in an action in the United States District Court for the Central District of California, *Cerro Corporation v. Touche Ross & Co., etc. et al.*, Case No. 73-1RF.

---

[1]Also pending in the United States District Court for the Central District was a class action *Don Farris and James Duncan v. Touche Ross & Co.*, Case No. CV 82-0398R and a class action by *Phillip Emrich and Eric Gillberg v. Sam Battistone, et al.*, No. CV 81-4547R (JRX) who are alleged to be former officers and/or directors of Sambo's. Those actions arise from the same transactions as this action.

Touche retained Mullen & Stabile to continue its representation in that litigation and from 1974 to mid-1979 Stabile actively represented Touche in connection with that matter. (Appendix A at ¶¶4 and 5).

During its representation of Touche, Mullen & Stabile had access to information and personnel within Touche for the purpose of analyzing and preparing Touche's defenses to charges of professional misconduct by Cerro Corp., another publicly held company. During the course of their representation, Mullen & Stabile discovered and were provided information which was privileged, confidential and proprietary as to Touche. Mullen & Stabile became intimately acquainted with the auditing systems and procedures of Touche and intimately acquainted with Touche's policies and procedures specifically regarding the defense of securities litigation. (Appendix A at ¶¶6 and 8).

Mullen & Stabile was paid over *$250,000* in attorney fees for services rendered in connection with the *Cerro* litigation. (Appendix A at ¶7).

The auditing services which were challenged in the *Cerro* litigation had been performed primarily by Touche's Los Angeles office, some of which were performed by and under the supervision of James Crosser, a partner of Touche. The auditing services being challenged in this action were performed, in part, by Touche's Los Angeles office under the supervision of James Crosser. (Appendix A at ¶¶8 and 9).

The instant Complaint alleges that Touche personnel were engaged in fraud and racketeering activities from 1977 through 1979 — the very same time period that Mullen & Stabile was defending Touche against allegations that it had failed to perform its services in a professional manner. (Appendix A at ¶10).

On August 11, 1981 Touche's deposition was taken in the *Muller* action. Since Mullen & Stabile was counsel of

record for Touche through 1979, Touche assumed that its deposition was being taken by plaintiffs merely as a non-party witness. Only after inquiry during the course of the deposition was it announced that plaintiff's counsel intended to file an action against Touche. The Complaint was filed the next day. (Appendix B at ¶¶2, 3 and 4).

Stabile's declaration filed in opposition to the Motion to Disqualify did not contradict Mr. Grosman's declaration that, in the course of representing Touche in the *Cerro* litigation, Mullen & Stabile acquired substantial proprietary information, and other confidential information regarding the auditing practices and procedures of Touche and the defense of those practices and procedures in litigation. The thrust of Stabile's declaration (Appendix C at ¶¶10 and 12) is that he did not disclose such information to co-counsel and that the knowledge Stabile acquired, insofar as relevant, is discoverable.

Stabile telephoned Rick Murray, general counsel for Touche, to discuss his representing plaintiffs in this action since he perceived the issue of a possible conflict of interest, but was unable to reach Mr. Murray. (Appendix C at ¶¶19, 20 and 21).

Stabile's telephone call to Mr. Murray can only mean that he was aware that his representation of the plaintiffs in this action gave the appearance of impropriety.

Even though Stabile denied knowledge of information directly concerning the Sambo's audit (Appendix C at ¶9) it is inevitable that the same or similar defenses will be asserted in this action as in the prior action since what is really at issue here are the auditing practices and procedures of Touche, something with which Mullen & Stabile, according to the unrefuted declaration of Norman C. Grosman, is intimately acquainted.

The disqualification of Mullen & Stabile's co-counsel was necessary to preserve Touche's confidences. Co-counsel's ongoing association with Mullen & Stabile in this action created the possibility of disclosure of confidential information which could be used against Touche. Also, Mullen & Stabile and co-counsel represented the plaintiffs in the *Muller* action. Thus, merely disqualifying Mullen & Stabile in this action was inadequate to safeguard Touche's interests or to avoid the appearance of professional impropriety. Because of the presumed free flow of information between Mullen & Stabile and their co-counsel, Touche sought the disqualification of all Petitioners' counsel.

Touche concurrently filed a separate motion for an order striking the Complaint under Federal Rule of Civil Procedure 11 or in the alternative dismissing the RICO claim. The motion to strike is not at issue in Petitioners' Petition. However, it was based upon the facts set forth in the motion for disqualification and the conduct of attorneys for Petitioners with respect to Touche's deposition.

On these facts, after oral argument, the district court granted the motion to disqualify all counsel and dismissed the Complaint without prejudice. It was on these facts that the Ninth Circuit affirmed the District Court's order.

IV.
THIS COURT SHOULD NOT GRANT THE WRIT.

A. The Standard of Review on Appeal Is Whether the Trial Court Abused Its Discretion.

The District Court's order did not and was not required to state that disqualification was based solely on the appearance of impropriety. *In Re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1351 (9th Cir. 1981), *cert. denied* 455 U.S. 990 (1982) held that "an order disqualifying counsel will not

be disturbed if the record reveals 'any sound' basis for the District Court's action." 658 F.2d at 1358.

Abuse of discretion is the standard of review. *Gas-A-Tron of Arizona v. Union Oil Co. of California*, 534 F.2d 1322 (9th Cir. 1976). Thus, Petitioners' argument that the order of the District Court is defective for failure of the District Court to articulate the principles upon which it issued its order is, at best, unconvincing. The Ninth Circuit adopted an "abuse of discretion" standard of review and correctly affirmed the District Court's order on the ground that the record demonstrated that it did not abuse its discretion under application of Canon 9 of the ABA Model Code of Professional Responsibility and Rule 4-101, of the State Bar Rules of Professional Conduct. The Ninth Circuit's Memorandum of Decision correctly reflects the law in this and other circuit courts as argued below.

B. There Was and Is No Issue That Mullen & Stabile Acquired Confidential Information Relevant to This Case in Its Prior Representation of Touche.

Touche does not disagree with Petitioners' contention that the knowledge acquired by counsel in the former representation must be of a confidential nature.

The evidence before the District Court was a declaration (Appendix A) which unequivocally stated that Mullen & Stabile not only acquired confidential information but acquired confidential information of a nature which could be used in the present litigation against Touche.

Stabile admitted, in Petitioners' response to Touche's motion for disqualification *that he did have access to confidential information* (Appendix G at ¶10):

> "During the course of my representation of Touche Ross, I of course engaged in many confidential communications with Touche Ross personnel."

C. Disqualification of Mullen & Stabile Was Not an Abuse of the Trial Court's Discretion.

Petitioners contend that the Ninth Circuit Memorandum disregarded the "general rules" governing attorney disqualification and that it conclusively presumes that confidential information was transmitted. The cases and rules set forth below demonstrate that the Ninth Circuit's Decision is not in conflict with its prior opinions or those of other circuits.

Trone v. Smith, 621 F.2d 994 (9th Cir. 1980) is the dispositive case on attorney disqualification in the Ninth Circuit. Under *Trone* disqualification is compelled when a former representation is "substantially related" to the present representation. Substantiality is present if the factual contexts of the two representations are similar or related. The primary criterion is whether there is "a reasonable probability that confidences were disclosed which could be used against the client in a later, adverse representation." If the latter exists, a substantial relationship between the two cases is presumed. *Trone v. Smith* at 998. There is no burden on the moving party to demonstrate that counsel has in fact breached the attorney-client privilege and disclosed confidential information.

Where issues involved in both lawsuits concern allegations of fraudulent or improper preparation of documents, disqualification is proper. *Government of India v. Cook Industries, Inc.*, 569 F.2d 737 (2d Cir. 1978).

Violation of the broad admonition of Canon 9 which provides that:

> "A lawyer should avoid even the appearance of professional impropriety"

is a basis for attorney disqualification since "no man can serve two masters." *Cinema Five Ltd. v. Cinerama, Inc.*,

558 F.2d 1384, 1385 (2d Cir. 1976).

Rule 4-101 of the Rules of Professional Conduct of the State Bar of California provides:

> "A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."[2]

These rules applied to the facts set forth above demonstrate that the Ninth Circuit could only have affirmed the District Court's order.

Furthermore, Rule 4-101 is a rule of State Law; and a decision based thereon is not properly reviewed by this Court.

D. Disqualification of Co-Counsel Did Not Constitute an Abuse of Discretion.

Petitioners argue that even if the court properly disqualified Stabile it was unnecessary to disqualify co-counsel because the disqualification of Stabile would have given Touche all the protection that it needed.

Petitioners contend that the Ninth Circuit was obligated to determine whether confidences had been disclosed so that Touche was likely to be unfairly disadvantaged.

As set forth in *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978):

> "The evidence need only establish the scope of the legal representation and not the actual receipt of the

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[2]Local Rule 1.3(d) of the United States District Court for the Central District of California has adopted the Rules of Professional Conduct of both the State Bar of California and the ABA Model Code of Professional Responsibility.

> allegedly relevant confidential information . . . doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification.
>
> . . . .
>
> "[T]he determination of whether there is a substantial relationship turns on the possibility or appearance thereof, that confidential information might have been given to the attorney in relation to the subsequent matter in which disqualification is sought. The rule thus does not necessarily involve any inquiry into the imponderables involved in the degree of relationship between the two matters but instead involves a realistic appraisal of the possibility that confidences had been disclosed on the one matter which will be harmful to the client in the other. *The effect of the Canons is necessarily to restrict the inquiry to the possibility of disclosure; it is not appropriate to inquire into whether confidences were disclosed.*" At page 224 (emphasis added).

Mullen & Stabile have not alleged an attenuated relationship with their co-counsel. Mullen & Stabile had a continuing association with their co-counsel in the *Muller* action which was identical in all material respects to this action. Therefore, Mullen & Stabile, even if disqualified from this action would still have been actively participating with co-counsel in *Muller*.

Even though Mullen & Stabile deny the disclosure of confidential information to co-counsel, the statement in Stabile's declaration that relevant confidential information will be subject to discovery, presented a genuine threat of disclosure.

The Court in *In Re Airport Car Rental, supra* held disqualification of co-counsel should be determined in accordance with the facts of each case.

Hull v. Celanese Corp., 513 F.2d 568 (5th Cir. 1975) is a case in which the Fifth Circuit affirmed an order dis-

qualifying a law firm in similar circumstances to those present here.

> "In *Hull* the plaintiff-attorney possessed confidential information concerning the opposing party's *strategy* in that particular case. Furthermore, unlike the case at bar, where once the Fujiyama firm is disqualified there would be no further consultation between the Fujiyama firm and Phillips, Nizer, in *Hull*, as the District Court noted, there would have been an *ongoing risk* of improper disclosure." 470 F.Supp. at 504.

That is precisely the risk that was before this Court in view of the relationship of Mullen & Stabile to their co-counsel in this and the *Muller* litigation.

In addition, one should look to Disciplinary Rule 5-105(D) of the A.B.A. Code:

> "If a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

Cases construing that rule have generally confined it to the law firm of the lawyer whose disqualification is sought. However, the close association of Mullen & Stabile with their co-counsel stands them in the same shoes as lawyers of a single law firm such that the application of DR 5-105(D) to these facts compelled the disqualification of all counsel.

A similar case to the one before this Court is *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977), where the Second Circuit relied in part upon DR 5-105(D) in disqualifying counsel.

Petitioners also argue that the Ninth Circuit Memorandum disregarded the detriment to the Petitioners' cause, by the disqualification of their chosen counsel. That argument is

rooted in the notion that the same attorneys having handled the *Muller* action in which they had already invested hundreds of hours developing facts, taking depositions and otherwise preparing for trial meant that disqualification would require losing the benefit of that preparation in this case against Touche. That argument only supports Touche's contention that the ongoing and continued relationship between Mullen & Stabile and their co-counsel in the *Muller* action absolutely required their disqualification in this action. This is particularly so since Petitioners consistently contended that the most efficient use of the class' resources would have been a joint prosecution of the *Muller* and Touche actions. Petitioners have attempted to use the *Muller* action as a shield against disqualification of their counsel in this action. However, that very shield was a sword against Touche if Mullen & Stabile's co-counsel had not been disqualified.

In this action, no discovery had commenced, and no time was wasted by Touche in responding to the Complaint by way of the Motion to Disqualify. It was Petitioners' counsel who chose to delay bringing an action against Touche. Petitioners' counsel cannot bootstrap their own improper conduct with a claim of prejudice.

V.
CONCLUSION.

Touche presented the District Court with a compelling factual basis for disqualifying Mullen & Stabile and their co-counsel. The public's view of the law, of lawyers and the judicial system is unquestionably diminished by conduct which has the appearance of impropriety. There is no question that the prior representation of Touche in the *Cerro* litigation is so factually similar to this action that the risk of disclosure of confidential information was a clear and present danger.

Furthermore, the continued association of Mullen & Stabile with its co-counsel in the *Muller* action compelled the conclusion that there would be free communication between the law firms and the possibility of disclosure of confidential information.

For all of the foregoing reasons it is respectfully submitted that this Court deny the Petition.

Respectfully submitted,

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HOWARD P. MILLER,
LORRAINE B. MOURA,
BUCHALTER, NEMER, FIELDS,
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RICHARD H. MURRAY, ESQ.,
TOUCHE ROSS & CO.,
By ELIHU M. BERLE,
Counsel for Respondent,
Touche Ross & Co.

APPENDIX A.

Declaration of Norman C. Grosman.

I, NORMAN C. GROSMAN, declare:

1. I am a partner of defendant, Touche Ross & Co., and if called as a witness, I could and would testify to the following facts all of which are within my personal knowledge.

2. Touche Ross is a partnership of certified public accountants with offices throughout the United States. The firm is organized as a single partnership with its executive office in New York City, New York.

3. I became associated with Touche Ross in 1953, and became a member of the firm in 1967. I was located in the Los Angeles, California office of Touche Ross from 1963 through 1979, and during the years 1974 through 1979, I was associated with the firm's Legal Department and worked at the direction of the firm's General Counsel, Richard H. Murray. During that period, my responsibilities included serving as the liaison between the firm and its outside counsel, including Gibson, Dunn & Crutcher and Mullen & Stabile. I am presently assigned to the firm's executive office in New York.

4. Prior to 1974 Gary Stabile, one of the attorneys for plaintiffs herein, was associated with the firm Gibson, Dunn & Crutcher, and in the course of that association, performed services on behalf of Touche Ross & Co., including work on the case *Cerro Corporation v. Touche Ross & Co., a partnership; Joseph De Franco, Andrew Berkey, II, Sidney L. Steinberg, William F. Staunton, Ralph Weinstock* in the United States District Court of the Central District of California, *Case No. 73-1-RF*. By an order dated 9/12/77 *Marmon, Inc.* was substituted as party plaintiff in place of *Cerro*.

5. In or about 1974 Mr. Stabile ceased his association with Gibson, Dunn & Crutcher and formed an office for the practice of law under the name of Mullen & Stabile. At that time, that firm and Mr. Stabile, jointly with Gibson, Dunn & Crutcher, undertook the representation of Touche Ross and its partners and employees in that litigation described in Paragraph 4 above. That litigation remained active through at least May, 1979.

6. During the course of their representation, Mullen & Stabile had access to information concerning practices, procedures, and policies of the firm with respect to the conduct of its professional practice and the defense of that practice in the context of litigation. Additionally, Mr. Stabile had access to and conducted extensive, privileged conversations with partners and employees of the firm for the purpose of analyzing and preparing the firm's defenses to charges of professional misconduct. During the course of this representation, Mullen & Stabile discovered, and was provided, information which was privileged, confidential, and proprietary.

7. During the course of the above-described representation, Touche Ross paid Mullen & Stabile more than $250,000.00 in fees for services rendered in connection with the *Cerro* litigation.

8. The auditing services which were being challenged in the *Cerro* litigation were professional services which had been performed, primarily by the Los Angeles office of Touche Ross, on behalf of a publicly held company. Some of those services had been performed by and under the supervision of James Crosser, a partner of Touche Ross.

9. The professional services being challenged in the instant action include services which were performed by James Crosser.

10. The allegations of the instant Complaint include allegations that Touche Ross personnel were engaging in fraud and racketeering activities during the time period 1977 through 1979. It was during this very same time period that Mullen & Stabile was representing Touche Ross and defending it against allegations of professional misconduct.

11. Defendant seeks the disqualification of Mullen & Stabile because there is potential injury to Touche Ross by their representation of plaintiffs herein. They acquired knowledge and information, of a privileged and proprietary nature, in their prior representation of defendant and that information bears directly upon the instant litigation.

12. Defendant also seeks the disqualification of all of the law firms representing plaintiffs because of their intimate association and connection with Mullen & Stabile and the assumed free flow of information between each of them and Mullen & Stabile.

13. I declare under penalty of perjury that the foregoing is true and correct. Executed at New York City, New York, this 14th day of September, 1981.

[SIGNED]

NORMAN C. GROSMAN

APPENDIX B.

Declaration of Jay R. Ziegler.

State of California, County of Los Angeles — ss.

I, JAY R. ZIEGLER, declare:

1. I am an attorney at law duly licensed to practice before this court and all courts in the State of California. I am a member of the firm of Buchalter, Nemer, Fields, Chrystie & Younger, a Professional Corporation, attorneys for Defendant Touche Ross & Co. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify thereto.

2. On August 11, 1981, the deposition of Touche Ross & Co. was taken by the Plaintiffs in *James Muller, et al. v. Sambo's Restaurants, etc., et al.*, case No. CV 80-3757, R (JRx) (the "Muller case"). I personally was present and represented Touche Ross at the deposition. Mr. Richard E. Herrinton, a partner of Touche Ross, testified on its behalf. Also present was Gary Stabile of the firm of Mullen & Stabile.

3. The deposition was pursuant to Notice. Based on the Notice that was received, it was Touche Ross' understanding that it was being deposed as a non-party witness in that matter, especially since Mullen & Stabile, attorneys for Plaintiffs in the Muller case, had recently been counsel for Touche Ross for a number of years in a matter in which the accounting practices of Touche Ross were in issue. Prior to and at the deposition I was unaware of the fact Mullen & Stabile had represented Touche Ross. Immediately prior to the deposition, I was first informed that counsel might later determine to sue Touche Ross, but that a final decision had not been made and the deposition might assist in arriving at that decision.

4. At a break in the deposition, I was informed that Plaintiffs now intended to file a separate action against Touche Ross arising out of the same transactions as those which are in issue in the Muller case. The following colloquy then took place between counsel:

"MR. ZIEGLER: Let's go back on the record.

"At the beginning of the deposition before we went on the record, I asked Mr. Hennigan about the intentions of the parties he represented in suing Touche Ross either in a separate lawsuit or in this lawsuit, and he indicated that it was a good possibility, but he wanted to proceed with the deposition to determine whether or not he felt it would be appropriate.

"At the break that we have just had, he indicated that he is now almost certain that he will either file a separate lawsuit or somebody will file on behalf of his clients a separate lawsuit against Touche Ross or seek to join Touche Ross in the present lawsuit concerning the subject matter of this lawsuit.

"Based on that state of affairs, I don't think it is appropriate for the deposition to continue, since it is apparent now that the deposition has been and is more for the purpose of pursuing a cause of action against Touche rather than obtaining discovery against the existing defendants. And since Touche Ross has not been already named and has no notice of the specific claims against it, albeit Mr. Hennigan's statements that it would be similar to what the existing pleadings are, we don't think it is fair to Touche Ross to be giving discovery in anticipation of a lawsuit when they will certainly be available after the lawsuit is initiated to give discovery; and that that discovery should be done in accordance with the Federal Rules of Civil Procedure and not before we have been named as a defendant. So on that basis, we feel that we have no alternative but to terminate the deposition at this time.

"Of course, recognizing that if and when Touche is named as a defendant in this lawsuit and after the appropriate time period for initiating discovery in that lawsuit, we will be back again for the purpose of Mr. Herrinton's deposition.

"I might also add that since we did not come here in the contemplation that we were a party or would shortly be named a party, Mr. Herrinton certainly did not spend as much time refreshing his recollection and doing the other things that a party might do in connection with a lawsuit that a nonparty witness often does not concern himself with. So I think in that sense, we have been sandbagged, if I can assume that it was always the intention of the plaintiffs to name Touche Ross, even before this deposition." (Transcript of deposition of Richard E. Herrinton, page 59, line 14-page 61, line 3).

5. *The complaint against Touche Ross in the within action was filed on August 12, 1981, at approximately 12:00 noon one day after the deposition.* Thus, the complaint against Touche Ross had apparently been prepared prior to the deposition, and it was also apparently known prior to the deposition that Touche Ross would be made a party in a separate action. Therefore, it appears that the deposition of Touche Ross was solely for the purpose of pursuing a cause of action against Touche Ross. Touche Ross was unaware of the Plaintiffs' motivations and attended the deposition without having undertaken the preparation that a party would ordinarily undertake.

6. The conduct of Mullen & Stabile and Plaintiffs' other counsel who are the same here as in the Muller case with respect to Touche Ross' deposition indicates at the least a lack of candor and fair play and is exemplary of the type of conduct that Touche Ross' motion to disqualify seeks to prevent.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California, this 18th day of September, 1981.

[SIGNED]

JAY R. ZIEGLER

APPENDIX C.

Declaration of Gary D. Stabile.

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United States District Court, Central District of California.

Phillip Emrich and Eric Gillberg, Plaintiffs, v. Touche Ross & Co., Defendant. Case No. CV 81 4104.

1. I am an attorney admitted to practice before this Court and a member of the law firm of Mullen & Stabile, one of the firms representing plaintiffs in this action.

2. From the time of my admission to practice before this Court in 1968 until March, 1974, I was an associate with the firm of Gibson, Dunn & Crutcher.

3. Gibson, Dunn then acted as counsel to Touche Ross & Co. in a number of matters, including *Cerro v. Touche Ross & Co.*, the case referred to in the moving papers. I was one of the Gibson, Dunn attorneys working on that case.

4. In the spring of 1974 I formed, with my partner, the firm of Mullen & Stabile.

5. For reasons of economy and efficiency a decision was made, by the Gibson, Dunn partner in charge of the *Cerro* case, the general counsel for Touche Ross and myself, that I would continue to represent Touche Ross in the *Cerro* case.

6. My firm and I became associated with Gibson, Dunn, as counsel of record for Touche Ross in the *Cerro* case in mid-1974 and continued to act in that capacity in the action until it terminated in the spring of 1979.

7. Since the termfination of the *Cerro* case I have not been employed by Touche Ross to represent it in any other matter.

8. My representation of Touche Ross was limited to acting as special litigation counsel, in association with Gibson, Dunn, in the *Cerro* case, and in no other matter.

9. During the course of that representation I do not believe I was even aware that Touche Ross was the auditor for Sambo's Restaurants, Inc. I had no access to and did not see any of the Touche Ross files or working papers relating to its audits of (or other work done for) Sambo's.

I did not talk to any Touche Ross personnel about Sambo's and in fact I do not believe I talked to any Touche Ross personnel that to my present knowledge did any work for Sambo's.

10. During the course of my representation of Touche Ross I of course engaged in many confidential communications with Touche Ross personnel. I have not disclosed the contents of such communication to any person, including my co-counsel in this action (except of course my co-counsel in the *Cerro* case, i.e., the Gibson, Dunn lawyers with whom I was then working). I have not disclosed any information at all about Touche Ross to my co-counsel in this case because I have no information about Touche Ross which would be of any interest to my co-counsel.

11. During the course of my representation of Touche Ross I did not learn anything, of a confidential nature or otherwise, that has anything to do with this case.

12. I did have access to auditing manuals and procedures which Touche Ross regards as proprietary and confidential. I have not retained any such materials to the best of my recollection. Such materials were subject to discovery in the *Cerro* case and, to the extent relevant, would be subject to discovery in any other action.

13. In April, 1981, some two years after the termination of my representation of Touche Ross in the *Cerro* case, my firm was substituted as counsel for plaintiffs in *Muller, et al., v. Sambo's Restaurants, Inc., etc. et al.* (the "sister" case referred to in the moving papers).

14. During the course of discovery in the *Muller* case questions concerning the adequacy of disclosure in and the accuracy of Sambo's financial statements contained in the two prospectuses in issue in that lawsuit suggested them-

selves. Touche Ross audited and opined on those financial statements.

15. Analysis of the financial statements by the other plaintiffs' counsel in this action led to the tentative conclusion that they did not fairly represent the financial condition and results of operations of Sambo's for the period reported on.

16. The deposition of Richard Herrinton, the Touche Ross partner in charge of the Sambo's audits, was therefore scheduled. During the course of the deposition, under questioning by Mr. Hennigan, it became clear, based on Mr. Herrinton's testimony, that a proper regard for the interests of the class in *Muller* required that Touche Ross be named as a defendant. Counsel for Mr. Herrinton was so advised and he then terminated the deposition.

17. The purchases of securities which form the subject matter of both this and the *Muller* actions occurred in the period January - October 1978. Because of the danger that plaintiffs' rights in this case might become time barred, the action was filed as soon as possible after the termination of the Herrinton deposition.

18. Between April, 1981 and July, 1981, when additional plaintiffs' counsel were associated, my firm, my partner and I, alone represented the plaintiffs in the *Muller* case. In the months of May and June we expended over 1,000 hours on the case. A great deal of that time was spent interviewing class members, former Sambo's employees, including those in the finance and accounting departments, and reviewing and analyzing Sambo's accounting and financial records.

19. When it became clear that Touche Ross must be named, the issue arose as to whether my firm should be counsel to the plaintiffs in this action as well as in *Muller*. On the one hand was the fact that I had once represented

Touche Ross. On the other hand was the fact that were my firm not to act as counsel to plaintiffs in this action, the fund of knowledge accumulated in *Muller* would be unavailable to plaintiffs here.

20. I determined that the consideration in favor of representing the plaintiffs in this action outweighed those against. My representation of Touche Ross in *Cerro* was a special situation, unlikely in my judgment to be repeated; that representation terminated over two years ago; I had not since been retained by Touche Ross; nothing that I learned in confidence during that representation is involved in this case. On the other hand, if my firm does not represent the plaintiffs in this case an important fund of knowledge will be unavailable.

21. Before this action was filed I called the office of Rick Murray, general counsel for Touche Ross, for the purpose of discussing these matters. I was told by his secretary that he was out of town and would return to the office for only a single day before again leaving, I believe for Europe. I requested that Mr. Murray call me when he returned and before he again left and described the matter as having some urgency. Mr. Murray did not return my call. The danger of time and the statute of limitations defense did not admit of further delay and this action was then filed.

22. I have and will continue to keep the confidences of my former client Touche Ross. I do not believe that my firm's representation of the plaintiffs in this case is in any way inconsistent with that continuing duty or in any way detrimental to Touche Ross. I do not believe that my firm's representation of the plaintiffs in this case involves any impropriety either actual or perceived.

23. If, however, the Court believes that the public perception of the legal profession or the administration of the

judicial system would be adversely affected by the continuation of this representation, I offer to withdraw from such representation. I believe such a result is unwarranted, unnecessary and adverse to the interests of the plaintiffs in this case. It is made solely for the reasons stated above, should the Court determine it to be advisable.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Beverly Hills, California on this 5th day of October, 1981.

[SIGNED]

GARY D. STABILE

No. 83-1050

IN THE

Supreme Court of the United States

October Term, 1983

PHILLIP EMRICH and ERIC GILLBERG,

Petitioners,

vs.

TOUCHE ROSS & CO.,

Respondent.

PHILLIP EMRICH and ERIC GILLBERG,

Petitioners,

vs.

SAM BATTISTONE, SR., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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vs.

SAM BATTISTONE, SR., *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

This Brief in Opposition addresses only the action known as *Phillip Emrich and Eric Gillberg v. Sam Battistone, Sr., et al.* The Respondents for whom this brief is submitted are not parties to the action known as *Phillip Emrich and Eric Gillberg v. Touche Ross & Co.*, a related case decided by the Court of Appeals in the same memorandum as the decision in *Phillip Emrich and Eric Gillberg v. Sam Battistone, Sr., et al.*

OPINION BELOW.

The Order of the District Court for the Central District of California is unreported. The Memorandum of the Court of Appeals for the Ninth Circuit which Petitioners ask this Court to review is also unreported, as is the Court of Appeals' Order Denying Petition for Rehearing. The District Court's Order and the Court of Appeals' Memorandum and Order are set out in the Appendix to the Petition for Certiorari ("Petitioners' Appendix").

JURISDICTION.

The jurisdictional prerequisites are adequately set forth in the Petition.

Questions Presented.

1. Whether certiorari should issue to review an unpublished memorandum decision of the Court of Appeals, with no precedential effect, affirming an exercise of discretion by the District Court determining, under a state rule of attorney conduct and the factual record before the Court, that Petitioners' counsel should be disqualified from representing Petitioners against Respondents in this case.

2. Whether certiorari should issue to review a legal contention of Petitioners concerning Rule 23(e) of the Federal Rules of Civil Procedure, not raised below, relating to an issue that was expressly not reached by the Court of Appeals.

STATEMENT OF THE CASE.

Background.

This lawsuit arises out of the sale and purchase of certain securities issued by Sambo's Restaurants, Inc. ("Sambo's") in the late 1970's. The securities were sold primarily to employees of Sambo's. Each of the Respondents, who were all officers and/or directors of Sambo's at the time, purchased the securities. (Respondents' Appendix (attached hereto) at A-1, A-6, A-9, A-12, A-14.) After the securities were sold, the management of Sambo's changed; Sambo's in turn changed several accounting practices relating to the securities; and, as a result, the securities became substantial liabilities for the purchasers.

A number of the purchasers of the securities, including several members of Sambo's' former management, organized the purchasers into a cohesive group to discuss possible strategies, including litigation, to protect their investment in the securities. (Respondents' Appendix at A-1 - A-2, A-6, A-9.) The group organized under the title of "Joint Venture 77-78 Group Association" (the "Association"), and retained counsel to advise it. Several members of Sambo's' former management (including several of the Respondents) became members of the Association and others (including several of the Respondents) contributed funds to the Association to help pay for legal fees. (Respondents' Appendix at A-11, A-12.)

The Association retained the law firm of Latham & Watkins to represent the purchasers of the securities. Once retained, Latham & Watkins examined whether the interests of Sambo's' former management were coincident with, or in conflict with, the interests of the other members of the Association. Latham & Watkins concluded that there was no conflict and proceeded to develop the facts for possible

litigation.

Meetings were held between Latham & Watkins and members of the Association, including several of the Respondents. (Respondents' Appendix at A-7, A-9 - A-10, A-13, A-14.) Members of Latham & Watkins made presentations during these meetings and requested and received funds for legal expenses from several of the Respondents. (Respondents' Appendix at A-7 - A-8, A-10 - A-11, A-13, A-14.) An attorney for some of the Respondents spoke personally with a member of Latham & Watkins in early July 1980 about Latham & Watkins' litigation plans. The Latham & Watkins attorney expressly stated that, in view of the strategy that Latham & Watkins had developed for the investors, there was no conflict of interest between the former management of Sambo's who were investors and the other investors. The Latham & Watkins attorney urged all members of former management to join the Association and to contribute to a litigation fund.

In early August 1980, a member of Latham & Watkins met with several of the Respondents and urged them to contribute both money and information to the Association. (Respondents' Appendix at A-13, A-14.) Three of the Respondents — who had been officers of Sambo's at the time that the securities were sold or thereafter — contributed all of the information they had which was relevant to the facts being developed by Latham & Watkins on behalf of the Association, including confidential information. (Respondents' Appendix at A-3 - A-4, A-7, A-10.)

The Muller Action.

On August 25, 1980, less than two weeks after Latham & Watkins' meeting with several of the Respondents, Latham & Watkins filed a class action in the Central District of California against Sambo's and other institutions on behalf

of all purchasers of the securities, including all of the Respondents. *Muller v. Sambo's Restaurants Inc., et al.*, United States District Court for the Central District of California, No. CV80-3757-R (JRx) ("*Muller*"). (Respondents' Appendix at A-4, A-8, A-10.) The complaint alleged that the prospectuses by which the securities had been sold were false and misleading and, as such, violated the Securities Exchange Act of 1933 and the Securities Act of 1934, and constituted common law fraud. No members of Sambo's' former management were named as defendants in the *Muller* action. Rather, they were within the alleged plaintiff class.

On the basis of the allegations in the complaint that the prospectuses were false and misleading, it was obvious to any experienced securities lawyer that at least some members of former management whose names appeared in the original prospectuses for the securities could have been named in good faith as defendants in the lawsuit, if their counsel so chose. Latham & Watkins, sophisticated securities lawyers, decided that it was in the interests of the class to have Sambo's' former management as part of the plaintiff class of purchasers, rather than as defendants. Later, Sambo's objected to the inclusion of its former management within the plaintiff class. Latham & Watkins vigorously defended its inclusion of Sambo's' former management within the class, but the District Court ruled to exclude them.

Several of the Respondents continued to remain active in the Association after the filing of the *Muller* action. Believing that Latham & Watkins continued to represent the interests of all purchasers of the securities, including Sambo's' former management, three of the Respondents gave approximately $8,000 to the Association to pay for the litigation. (Respondents' Appendix at A-4, A-8, A-11.)

Approximately eight months after the filing of the *Muller* complaint, the law firm of Latham & Watkins substituted out as class counsel in favor of the law firm of Mullen & Stabile. Three months later, the law offices of Josef D. Cooper (now succeeded by Cooper, Kirkham & McKinney) and the law firm of Bretz & Hennigan associated with Mullen & Stabile as class counsel. Later the law firm of Stoll & Stoll was also associated with Mullen & Stabile as counsel for the class. Latham & Watkins has never denied that it shared with its successor, Mullen & Stabile, Latham & Watkins' entire work product, including all information supplied to Latham & Watkins by Respondents. Mullen & Stabile has never denied that it shared with its three co-counsel Latham & Watkins' entire work product, including all information supplied to Latham & Watkins by Respondents.

The Instant Action.

In September 1981, the law firms that then represented the class in the *Muller* action, without the firm of Mullen & Stabile[1], filed this action against the Respondents on behalf of the class as ultimately defined in *Muller*, *i.e.*, all purchasers of the securities except members of Sambo's' former management. The action was filed in the Central District of California and assigned to the same judge to whom the *Muller* action was already assigned. (Petitioners' Appendix at A-23 - A-24.) The complaint in this action, alleging wrongdoing in the sale of the Sambo's securities in the late 1970's, is a virtual carbon copy of the *Muller*

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[1]Mullen & Stabile are conspicuous by their absence as counsel of record in this case. However, as the Ninth Circuit pointed out, on both the Excerpt of Record and the Designation of Record filed with the Ninth Circuit, Mullen & Stabile is listed as counsel for Petitioners. (Petitioners' Appendix at A-28.)

complaint. (Petitioners' Appendix at A-22.) Only the defendants in the two actions are different; while *Muller* was filed against Sambo's and other institutions, this action was filed against individual members of Sambo's' former management.

The Motion to Disqualify Counsel.

Local Rule 2.5.1 of the United States District Court for the Central District of California provides that the Rules of Professional Conduct of the State Bar of California govern the conduct of attorneys practicing before the District Court. Rule 4-101 of the Rules of Professional Conduct of the State Bar of California provides that

> a member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which [the attorney] has obtained confidential information by reason of or in the course of his employment by such client or former client.

Respondents promptly moved in the District Court to disqualify counsel for the class on the ground that their representation constituted a violation of Rule 4-101. Respondents also moved to dismiss the complaint filed against them by such counsel and to enjoin the disclosure of confidential information.

In support of their motion, Respondents submitted declarations that (a) five of the Respondents had been expressly assured by Latham & Watkins and leaders of the Association that they would not be sued by the class, (b) that five of the Respondents had contributed money to the class' litigation efforts or to the Association, and (c) that three of the Respondents had provided confidential information to Latham & Watkins in preparation for the *Muller* litigation.

(Respondents' Appendix at A-1 - A-15.) Respondents contended under Rule 4-101 that, just as Latham & Watkins would have been precluded from suing Respondents after acting as their counsel and receiving their confidential information, present class counsel, which had substituted in place of Latham & Watkins and received all of Latham & Watkins' work product, could not — without Respondents' consent, which was neither sought nor obtained — represent the class against Respondents in this action.

In opposition to Respondents' motion, attorneys from each of the three class counsel law firms submitted nearly identical declarations stating that they personally had had no substantive discussions with any attorneys from Latham & Watkins; however, each said nothing about his communications with Mullen & Stabile. (Petitioners' Appendix at A-51, A-56, A-61 - A-62.) Gary Stabile of Mullen & Stabile, the immediate successor to Latham & Watkins, also submitted a carefully worded declaration which stated that Latham & Watkins never provided "confidential information *whose source was identified as any of the defendants in this action*." (Emphasis added) (Petitioners' Appendix at A-51.) Mr. Stabile further declared that he had not relayed any information to present class counsel "which was obtained from Latham & Watkins *regarding any of the defendants*." (Emphasis added) (Petitioners' Appendix at A-51 - A-52.) One member of Latham & Watkins — not the member who held the extensive discussions with the Respondents — declared that he personally had never met Respondents nor passed on any information received from them. (Petitioners' Appendix at A-73.)

None of Petitioners' declarations denied (a) that attorneys from Latham & Watkins had had extensive factual discussions with Respondents, (b) that Latham & Watkins had received money from Respondents, (c) that Latham & Wat-

kins had developed the *Muller* action on the basis of information received from Respondents, (d) that Latham & Watkins had turned over its entire work product to, and shared all of its impressions with, Mullen & Stabile, or (e) that Mullen & Stabile had turned over all of Latham & Watkins' work product to, and shared all of its impressions with, its three co-counsel firms.

On this record, after hearing oral argument, the District Court granted Respondents' motion, disqualified Petitioners' counsel and dismissed the action without prejudice.

The Appeal.

Class counsel appealed, and the Court of Appeals for the Ninth Circuit, in an unpublished memorandum decision without precedential value, affirmed the District Court's order.[2] The Court of Appeals observed Petitioners' carefully worded declarations and held, on this record, that the District Court had not abused its discretion in disqualifying Petitioners' counsel under Rule 4-101 of the Rules of Professional Conduct of the State Bar of California, without requiring further proof by Respondents. At no point did the Court of Appeals ever articulate any evidentiary presumptions, rebuttable or irrebuttable. Rather, the Court declined to interfere with what it termed the District Court's resolution of matters of credibility as to factual issues underlying its decision. (Petitioners' Appendix at A-29.) Finally, finding that Rule 4-101, relating to confidential information, was alone sufficient support for the District Court's order, the Court of Appeals expressly did not reach any issue presented by Latham & Watkins' promise to Respondents

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[2]Pursuant to the Rules of the United States Court of Appeals for the Ninth Circuit, such a memorandum decision is not published and is without precedential value. 9th Cir. R. 21(a), (c).

that they would not be sued by the class.[3] (Petitioners' Appendix at A-30 - A-31.)

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[3]The Court of Appeals held that the District Court's Order dismissing the action without prejudice was not appealable. (Petitioners' Appendix at A-18 - A-19.) Petitioners have not questioned that ruling in their Petition.

REASONS FOR DENYING THE WRIT.

The Petition for Certiorari should not be granted to review the unpublished decision of the Court of Appeals because (1) the decision rests on an issue of state law, (2) the decision does not present a conflict among the circuits, (3) the decision is not in conflict with the reported decisions of the Ninth Circuit, and (4) the decision presents no issue under Rule 23(e) of the Federal Rules of Civil Procedure.

A. The Court of Appeals' Decision Rests on an Issue of State Law.

The decision of the Court of Appeals rests squarely on a discretionary application of a state rule of attorney conduct. (Petitioners' Appendix at A-29 - A-30.) No federal issues — either constitutional, statutory, or common law — are addressed or presented. This Court should not and, pursuant to its own rules, will not grant certiorari to review the application of a principle of purely state law. Supreme Court Rule 17.

B. The Court of Appeals' Decision Does Not Present a Conflict Within the Circuits.

In one argumentative heading of their petition, Petitioners state that the unpublished decision of the Ninth Circuit conflicts with the decisions of other circuits. (Petition for Writ of Certiorari ("Petition") at 10.) Because the Ninth Circuit's decision is unpublished, has no precedential value, and cannot be cited even to the Ninth Circuit or to any District Court within the Circuit, 9th Cir. R. 21(c), it cannot present a conflict with the decisions of other circuits. In addition, it is clear from reading Petitioners' argument that what they are really complaining about is not a conflict among the circuits, but rather what they perceive as a conflict between the reported decisions of the Ninth Circuit and

the Ninth Circuit's unreported memorandum decision in this action. (Petition at 13.) Even if such a conflict did exist, the Supreme Court is not the proper forum for the resolution of intracircuit conflicts. *Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 900, 902 (1957).

C. The Court of Appeals' Decision Is Not in Conflict With the Reported Decisions of the Ninth Circuit.

Petitioners not only fail to demonstrate the existence of a conflict among the circuits, they fail even to demonstrate a conflict within the Ninth Circuit. Petitioners state that the general rule in the Ninth Circuit on a motion for disqualification under Rule 4-101 of the Rules of Professional Conduct of the State Bar of California is that the moving party must demonstrate more than merely a co-counsel relationship between original counsel and later counsel in order to warrant the disqualification of later co-counsel. (Petition at 10-13, citing *In Re Coordinated Pretrial Proceedings*, 658 F.2d 1355, 1361 (9th Cir.), *cert. denied*, 455 U.S. 990 (1982).) Petitioners then go on to state that "[t]he Ninth Circuit memorandum disregards these general rules; it *conclusively* presumes the opposite — that confidential information was transmitted and that an impropriety existed . . . ." (Petition at 13.)

Petitioners simply misstate the Ninth Circuit memorandum decision. The Ninth Circuit did not presume that confidential information was transmitted. The District Court had before it carefully worded attorney declarations which consistently failed to deny that information conveyed by Respondents to Latham & Watkins was communicated to all other counsel. The District Court also had before it declarations from Respondents which stated unequivocally that confidential information had been given to Latham & Wat-

kins. (Respondents' Appendix at A-3 - A-4, A-7, A-10.) On this record, where the attorneys carefully failed to deny the transmittal of the confidential information and where the district judge had before him three related actions, all with the same attorneys, the Court of Appeals held that the District Court had not abused its discretion in disqualifying Petitioners' counsel under Rule 4-101 without requiring further proof from Respondents. (Petitioners' Appendix at A-23, A-29 - A-30.) No presumption was involved.

D. The Court of Appeals' Decision Did Not Reach Any Issue Under Rule 23(e) of the Federal Rules of Civil Procedure; Nor Was Any Such Issue Raised by Petitioners Below.

Petitioners state that Latham & Watkins' promise to Respondents that the class would not sue them was in effect a class settlement not approved by the District Court as required by Rule 23(e) of the Federal Rules of Civil Procedure. This contention is not properly presented in this case, because the Court of Appeals expressly did not reach the issue of Latham & Watkins' promise not to sue; nor was Petitioners' contention concerning Rule 23(e) raised below.

A question presented for review in a petition for certiorari must properly arise in the record and must have been urged and briefed below. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). The Supreme Court normally will not consider an issue if the Court of Appeals has not passed on it. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163 (1975). Only in "exceptional circumstances" will the Court deviate from its normal practice of not considering issues not presented or passed upon below. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

Latham & Watkins' promise not to sue was not a ground for the Ninth Circuit's memorandum decision affirming the District Court; in fact the Court of Appeals expressly did not reach that issue in its memorandum decision. (Petitioners' Appendix at A-30 - A-31.) Moreover, Petitioners did not so much as mention Rule 23(e) in the District Court or in their brief in the Court of Appeals. Their sole mention of Rule 23(e) is contained in one sentence in their reply brief in the Court of Appeals. In this one sentence, Petitioners do not argue that the District Court acted in contradiction to Rule 23(e) of the Federal Rules of Civil Procedure; they simply state that Respondents "know better than to argue that Latham had the power to bind *Muller* class members to a waiver of their claims without notice and court approval pursuant to Rule 23(e)." (Reply Brief at p. 4.) This sole reference to Rule 23(e), made in passing in a reply brief, does not rise to the level of urging and briefing the issue below.

CONCLUSION.

For the reasons set forth above, the Petition for a Writ of Certiorari is without merit and should be denied.

Dated: January 30, 1984.

Respectfully submitted,

C. STEPHEN HOWARD,
Counsel of Record,
JEFFREY M. HAMERLING,
BONNIE S. KLAPPER,
TUTTLE & TAYLOR
INCORPORATED,
Attorneys for Respondents, Dann V. Angeloff, Robert Hild and George Cavalletto,

GARY R. RICKS,
PRICE, POSTEL & PARMA,
Attorneys for Respondents, Sam Battistone, Sr., Sam Battistone, Jr., F. Newell Bohnett, Owen Johnston, William L. Wagner, George McKaig and Bruce N. Anticouni.

APPENDIX.

Declaration of Owen Johnston.

United States District Court, Central District of California.

Phillip Emrich and Eric Gillberg, Plaintiffs, v. Sam Battistone, Sr.; Sam D. Battistone, Jr.; F. Newell Bohnett; Robert Hild; Owen Johnston; William L. Wagner, Sr.; George McKaig; Dan V. Angeloff; George A. Cavalletto; and Bruce N. Anticouni, Defendants. Case No. CV 81-4547 (JRx).

I, OWEN JOHNSTON, declare:

1. The matters declared herein are within my personal knowledge and I could competently testify thereto, if sworn as a witness.

2. I am a named defendant in this action (Emrich v. Battistone, et al.). I was associated with Sambo's Restaurants, Inc. for over ten (10) years and held the positions of Senior Vice President and Chief Financial Officer. I was an officer and director of Sambo's Restaurants, Inc. at all times relevant to the subject matter of this action. I am an investor in the joint ventures which are the subject of this action.

3. In early 1980, several people who participated in the joint ventures which are the subject of this action, including myself, got together to discuss their ownership interests and rights in regard to those joint ventures. An Organizing Committee composed of H. Oliver Dixon, Stanley L. Diemoz, Robert B. Elmerick and Noel Hayes was appointed to spearhead the formation of an Association to be made up of the owners of joint venture interests.

4. During the formation of this Association, I met with Robert Elmerick on numerous occasions and also with other members of the Organizing and later Executive Committees. The reasons I joined the Association and took an active part in its formation were:

(a) It was the only organized resistance to what the management of Sambo's Restaurants, Inc. was doing with the joint venture group administration;

(b) The Association was on record as stating that they wished to represent as many joint venture group holders of any kind that they could;

(c) I was offered, through my nomination to the Executive Committee of the Association, an opportunity to become closely involved and use my experience and knowledge of Sambo's Restaurants, Inc. activities to aid the Association.

5. The Association at first consulted with Phil Marantz of the law firm of Freshman, Mulvaney, Marantz, Cowsky, Forst, Kahan & Deutsch to investigate our legal rights with respect to joint venture interests. Mr. Marantz was known to many of us personally and was, at that time, acting as legal counsel for Sam D. Battistone, Jr., one of my co-defendants herein. He suggested we formally retain other attorneys, Latham & Watkins, a firm which he felt had the expertise and manpower to represent our interests. The Association did, in fact, retain Latham & Watkins in early 1980.

6. As a result of my close involvement with the Association's plans and goals and of my past positions in Sambo's Restaurants, Inc., my name was presented to the membership of the Association in nomination for a post on the Executive Committee. My name was submitted in a ballot dated February 20, 1980, a true and accurate copy of which is attached hereto as Exhibit A.

7. At the time of my nomination there was nothing said about any possible conflict of interest, and at all times in which I was involved in the Association, I believed our interests were not in conflict. The names of my co-defen-

dants herein, William Wagner, Sr. and Bruce Anticouni, were also submitted on this ballot.

8. The Executive Committee was to work with the Association's counsel, act as representatives for all of Sambo's joint venturers, protect the Association's interests, and to ascertain the full legal rights and benefits due to owners of joint venture interests.

9. Due to what Latham & Watkins characterized as a possible conflict of interest which might arise in future litigation the three of us had to decline our nominations to the Executive Committee. A true and accurate copy of a letter dated March 24, 1980, which states the results of the election for the Executive Committee, is attached hereto as Exhibit B.

10. Despite the fact that I had to decline my nomination to the Association's Executive Committee on the advice of counsel, I was later advised that I was nonetheless a viable member of the Association and that it would protect my interests. I was solicited for further contributions and encouraged to continue participating in the Association. Before contributing cash, I requested and received specific assurances from members of the Executive Committee that I would not be sued personally and that there was absolutely no possibility that the Association would not protect my interests. In reliance thereon, I continued to discuss the Association's activities with Robert Elmerick and other members of the Executive Committee, and to receive letters and reports on the progress of the Association.

11. I freely and willingly contributed any and all knowledge I had which was relevant to the facts being developed by Latham & Watkins on behalf of the Association. This included substantial amounts of confidential information in regard to the operation, management, and policies of Sam-

bo's Restaurants, Inc. during the time I served as an officer and/or director, including all of those times which are relevant to the subject matter of this action. I did, in fact, impart substantial amounts of such confidential information both to other members of the Association, members of its Executive Committee, and its attorneys based upon the clear understanding that the Association and counsel retained by it were representing my interests.

12. Based on the facts developed by it, Latham & Watkins recommended that a class action lawsuit be brought on behalf of the members of the Association and all those similarly situated against Sambo's Restaurants, Inc., United California Bank and Crocker Bank. This action, *Muller v. Sambo's Restaurants, Inc.* et al., United States District Court for the Central District of California, Case No. CV 80-3757-R (JRx), was filed by Latham & Watkins on August 25, 1980. The plaintiff class in the *Muller* action was essentially made up of the members of the Association, of which I was still a member at the time the action was filed. It was not until the class was certified in December, 1980, that I was excluded from the class.

13. I believe that Latham & Watkins developed and filed the *Muller* class action complaint based on information which was in a large measure gained from confidential information which I shared with them during the period of time I understood them to be representing my interests.

14. In addition to contributing information, I also contributed substantial amounts of money to the Association for fees of legal counsel who were retained to represent our interests. On September 15, 1980, several weeks after the *Muller* action was filed, I wrote a check to the "Group 77/78 Trust" for $5,100.00, which was my share based on a formula that the Association had developed based on units owned in joint venture groups. At the time I contributed

this money, I believed that the Association and Latham & Watkins were representing my interests. None of my contributions to the Association for costs and legal fees has ever been returned, nor has there ever been any offer to return them.

15. I have at no time consented to be sued by the Association and its attorneys on the basis of the information which I willingly supplied to them on the belief that an attorney-client relationship existed between said attorneys and me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Barbara, California, this 18 day of December, 1981.

/s/ Owen G. Johnston
Owen Johnston

Declaration of William L. Wagner, Sr.

United States District Court, Central District of California.

Phillip Emrich and Eric Gillbert, Plaintiffs, v. Sam Battistone, Sr.; Sam D. Battistone, Jr.; F. Newell Bohnett; Robert Hild; Owen Johnston; William L. Wagner, Sr.; George McKaig, Dan V. Angeloff; George A. Cavalletto; and Bruce N. Anticouni, Defendants. Case No. CV 81-4547 (JRx).

I, WILLIAM L. WAGNER, SR., declare:

1. The matters declared herein are within my personal knowledge and I could competently testify thereto, if sworn as a witness.

2. I am a named defendant in this action (Emrich v. Battistone, et al.). I was associated with Sambo's Restaurants, Inc. for ten (10) years and held the positions of Executive Vice President and member of the Board of Directors. I was an officer and director of Sambo's Restaurants, Inc. at all times relevant to the subject matter of this action. I am an investor in the joint ventures which are the subject of this action.

3. In early 1980, I met in Santa Barbara, California, with a group of people who were considering forming an Association to represent the owners of those joint venture interests. In attendance at the first meeting, which was held at Wayne Kees' residence, were approximately fifteen (15) people, including Eric Gillberg, a named plaintiff in this action. The next meeting I attended was held at the Pepper Tree Inn several months later. There was approximately forty (40) people in attendance. An Organizing Committee composed of H. Oliver Dixon, Stanley L. Diemoz, Robert B. Elmerick and Noel Hayes was appointed to spearhead this Association which was made up of the owners of the joint venture interests.

4. At these first two meetings, among the items discussed were possible litigation by and against Sambo's Restaurants, Inc. and possible litigation with United California Bank and Crocker Bank.

5. At these early meetings, the subject of the former officers and directors of Sambo's Restaurants, Inc. being part of the Association was discussed, with the result that we were asked to remain in the Association and to help and assist in any way possible.

6. During early 1980, the Association engaged the law firm of Latham & Watkins to represent the interests of the members of the Association. I attended a meeting in Santa Barbara, California, at the Great American Restaurant Company conference room at which a Mr. Poovey of Latham & Watkins was present and the various aspects of possible litigation against Sambo's Restaurants, Inc. and others were discussed. I attended one or two more meetings after that at which attorneys from Latham & Watkins were present and at which litigation strategy was discussed.

7. At these meetings, I willingly volunteered all knowledge I had which was relevant to the facts that the attorneys from Latham & Watkins were developing with respect to litigation against Sambo's Restaurants, Inc. and the banks. This included considerable confidential information regarding the operation, management and policies of Sambo's Restaurants, Inc. during the time I served as an officer and/or director, including all of those times which are relevant to the subject matter in this action. I contributed this information after having been assured that the Association had no intention of suing the former officers and directors of Sambo's Restaurants, Inc. and with the firm belief that the attorneys from Latham & Watkins to whom I was disclosing the confidential information were acting as attorneys for me and all other members of the Association. Had I not believe

this to be true, I would not have disclosed such information to those attorneys.

8. As well as attending these meetings and providing confidential information to legal counsel for the Association, I also paid a substantial amount of money toward the legal fees being incurred by the Association. On August 20, 1980, I wrote a check to the Association in the amount of Two Thousand Six Hundred Dollars ($2,600.00) to help defray the fees for legal services being rendered by Latham & Watkins to the Association. I paid this amount with the understanding that it was going to pay the fees of attorneys who were representing my interests. I certainly would not have contributed this money had I thought that the same Association would later find it convenient to sue me.

9. While I was still a member of the Association, Latham & Watkins filed a class action lawsuit on behalf of the Association and others. This action is entitled *Muller v. Sambo's Restaurants, Inc., et al.*, United States District Court for the Central District of California, Case No. CV 80-3757-R (JRx). I feel that the *Muller* complaint was prepared, in part, on the confidential information which I supplied to Latham & Watkins during the time period I believed them to be serving as my attorneys.

10. I have at no time consented to be sued by the Association and its attorneys on the basis of information which I willingly supplied to them on the belief that an attorney-client relationship existed between said attorneys and me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Barbara, California, this 18 day of December, 1981.

/s/ William L. Wagner, Sr.
William L. Wagner, Sr.

Declaration of Bruce N. Anticouni.

United States District Court, Central District of California.

Phillip Emrich and Eric Gillberg, Plaintiffs, v. Sam Battistone, Sr.; Sam D. Battistone, Jr.; F. Newell Bohnett; Robert Hild; Owen Johnston; William L. Wagner, Sr.; George McKaig; Dan V. Angeloff; George A. Cavalletto; and Bruce N. Anticouni, Defendants. Case No. CV 81-4547 (JRx).

I, BRUCE N. ANTICOUNI, declare:

1. The matters declared herein are within my pesonal knowledge and I could competently testify thereto, if sworn as a witness.

2. I am a named defendant in this action (Emrich v. Battistone, et al.). I was associated with Sambo's Restaurants, Inc. for six (6) years and held the positions of Vice President and General Counsel. I was an officer of Sambo's Restaurants, Inc. at all times relevant to the subject matter of this action. I am an investor in the joint ventures which are the subject of this action.

3. At the beginning of 1980, a group of people who had also invested in the joint ventures were brought together to form an Association. This Association was organized primarily through the efforts of Bob Elmerick and Oliver Dixon for the purpose of taking legal action in response to what Sambo's Restaurants, Inc. was then doing with the joint venture group administration. I was approached to join the Association and did so.

4. During mid 1980, I attended two or three meetings held at the Invest West offices in Santa Barbara, California, which were called by Bob Elmerick to meet with attorneys from Latham & Watkins, the law firm hired by the Association to represent its interests. At those meetings, strategy for possible litigation was discussed and developed. In ad-

dition, I had one or possibly two telephone conversations with one or more attorneys at Latham & Watkins subsequent to those meetings in which we discussed various aspects of the litigation that they were proposing to bring on behalf of the Association.

5. During these meetings and telephone conversations, I willingly cooperated with the attorneys from Latham & Watkins and contributed all information which I felt I could legally and ethically divulge without violating any attorney-client relationship which might exist between Sambo's Restaurants, Inc. and me as a result of my service as its General Counsel. I did so with the clear understanding that, having been retained by the Association, Latham & Watkins was acting as legal counsel for me and all other members of the Association. Had I not understood and believed this to be the case, I would not have supplied the information that I did.

6. Sometime after being retained by the Association, Latham & Watkins recommended that a class action lawsuit be brought on behalf of the members of the Association and all those similarly situated against Sambo's Restaurants, Inc., United California Bank and Crocker Bank. Such a class action lawsuit was, in fact, filed by Latham & Watkins on August 25, 1980, and was entitled *Muller v. Sambo's Restaurants, Inc., et al.*, United States District Court for the Central District of California, Case No. CV 80-3757-R (JRx). Inasmuch as I was still a member of the Association at that time, I believed myself to be part of the plaintiff class in the *Muller* action. I remained a member of said plaintiff class until the class was certified in or about December, 1980, at which time I and other former officers and directors were excluded.

7. I feel that Latham & Watkins developed and filed the *Muller* class action complaint based in part on the in-

formation which I confided in them under the belief that they were acting as attorneys on my behalf.

8. In addition to meeting with legal counsel for the Association and supplying them with information, I contributed money to the Association for legal fees. When I was first approached to join the Association I was asked to pay $100.00 toward legal fees and did so. This money was later returned to me by Latham & Watkins. However, subsequent to the filing of the *Muller* class action, I received a telephone call from Bob Elmerick and a personal solicitation from Oliver Dixon requesting that I remain a member of the Association because Latham & Watkins had apparently concluded that no conflict of interest existed between the former officers and directors of Sambo's Restaurants, Inc. and the other members of the Association and that no lawsuit would be filed by the Association against said former officers and directors. With this understanding and on the assumption that Latham & Watkins was representing my interests, I paid Oliver Dixon $300.00 in cash to transmit to the Association for legal fees, which I believe was done. This $300.00 sum has never been returned to me nor has there ever been an offer to return it.

9. I have at no time consented to be sued by the Association or its attorneys on the basis of the information which I willingly supplied to Latham & Watkins with the understanding that an attorney-client relationship existed between us.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Barbara, California, this 18 day of December, 1981.

/s/ Bruce N. Anticouni
Bruce N. Anticouni

Declaration of George A. Cavalletto.

I, GEORGE A. CAVALLETTO, declare as follows:

1. I am a defendant in this action.

2. I was a director of Sambo's Restaurants, Inc. ("Sambo's") during 1977 and 1978 when units of Sambo's Restaurant Group 1977-1978 ("Group '77-'78") were offered and sold. I myself purchased 70 units of Group '77-'78 for a purchase price of $210,000.

3. I resigned as a director of Sambo's on July 31, 1979.

4. In late 1979, the then current management of Sambo's decided to change several accounting practices relating to Group '77-'78, retroactive to January 1, 1979, thereby causing Group '77-'78 to reflect an operating loss for 1979 and triggering claims by United California Bank that its loans relating to Group '77-'78 were in default.

5. There was great concern among the Group '77-'78 investors, including myself, as a result of these developments, and various meetings were held to discuss what could be done about the problem.

6. It was determined at an early point that legal advice would be required in order to respond effectively to the problems of the Group '77-'78 investors.

7. On January 3, 1980, to help pay for such legal advice, I contributed $100 to the Freshman, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch Trust Account. This sum was later returned to me on June 5, 1980.

8. On May 15, 1980, I attended a meeting of Group '77-'78 investors at the home of Mr. Wayne Kees. This meeting is described in Paragraph 3 of the Declaration of Mr. William Wagner filed herein on or about December 21, 1981.

9. On July 9, 1980, I attended a meeting of Group '77-'78 investors at which attorneys Philip Marantz of Fresh-

man, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch and Kenneth Poovey of Latham & Watkins made presentations and funds of legal expenses were solicited.

10. On August 12, 1980, I attended a meeting of about 10 to 15 individuals, primarily former officers and directors of Sambo's, at the offices of Invest West. (*See* Declaration of Bruce Anticouni filed herein on or about December 21, 1981, Para. 4.) Mr. Poovey made a presentation at this meeting, and funds were again solicited.

11. At this meeting, Mr. Poovey assured the former officers and directors of Sambo's in attendance, including myself, that we would not be sued by the Group '77-'78 investors.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 30, 1981, at Goleta, California.

/s/ George A. Cavalletto
GEORGE A. CAVALLETTO

Declaration of Robert L. Hild.

I, ROBERT L. HILD, declare as follows:

1. I am a defendant in this action.

2. I was a director of Sambo's Restaurants, Inc. ("Sambo's") during 1977 and 1978 when units of Sambo's Restaurant Group 1977-1978 ("Group '77-'78") were offered and sold. I myself purchased 100 units of Group '77-'78 for a purchase price of $300,000.

3. I resigned as a director of Sambo's on July 31, 1979.

4. In late 1979, the then current management of Sambo's decided to change several accounting practices relating to Group '77-'78 retroactive to January 1, 1979, thereby causing Group '77-'78 to reflect an operating loss for 1979 and triggering claims by United California Bank that its loans relating to Group '77-'78 were in default.

5. There was great concern among the Group '77-'78 investors, including myself, as a result of these developments, and various meetings were held to discuss what could be done about the problem.

6. It was determined at an early point that legal advice would be required in order to respond effectively to the problems of the Group '77-'78 investors.

7. On December 20, 1979, to help pay for such legal advice, I contributed $100 to the Freshman, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch Trust Account. This sum was later returned to me on June 23, 1980.

8. On July 9, 1980, I attended a meeting of Group '77-'78 investors at which attorneys Philip Marantz of Freshman, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch and Kenneth Poovey of Latham & Watkins made presentations and funds for legal expenses were solicited.

9. On August 12, 1980, I attended a meeting of about 10 to 15 individuals, primarily former officers and directors

of Sambo's, at the offices of Invest West. (*See* Declaration of Bruce Anticouni filed herein on or about December 21, 1981, Para. 4.) Mr. Poovey made a presentation at this meeting, and funds were again solicited.

10. At this meeting, Mr. Poovey assured the former officers and directors of Sambo's in attendance, including myself, that we would not be sued by the Group '77-'78 investors.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 31, 1981, at Santa Barbara, California.

/s/ Robert L. Hild
ROBERT L. HILD